SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 239

HARTFORD ACCIDENT & INDEMNITY COMPANY AND ÆTNA CASUALTY & SURETY COMPANY, APPELLANTS,

vs.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1933

[fols. a-1]

IN CHANCERY COURT OF ADAMS COUNTY

C. #5323. B. #—

NATCHEZ INVESTMENT CO., INC., Complainant,

vs.

J. V. & R. T. BURKES et al., Defendants

INTERVENTION, ANSWER, AND CROSS-BILL OF COMPLAINT OF N. O. NELSON MFG. CO., ASSIGNEE OF A. W. MOORE, PROPRIETOR OF AND DOING BUSINESS AS ACME ENGINEERING CO. —Filed Aug. 17, 1929.

To the Honorable Chancery Court of Adams County, Mississippi:

Now comes N. O. Nelson Manufacturing Company, by Brandon & Brandon, its Attorneys, and by leave of this Honorable Court first had and obtained files this its Intervention, Answer and Cross-Bill of Complaint in the above and foregoing styled cause pending in this Honorable Court, and shows unto the Court that said Intervenor is the Assignee of A. W. Moore, Proprietor of and doing business as Acme Engineering Company, named as Defendant in the above and foregoing styled cause, and that it is the legal holder of a promissory note of J. V. Burkes and R. T. Burkes, co-partners under the firm name of J. V. & R. T. Burkes, payable to the order of Acme Engineering Co., and are entitled to all rights and benefits of said Acme Engineering Company under and on the indebtedness mentioned in the Bill of Complaint filed herein as owing by said J. V. & R. T. Burkes herein to the said Acme Engineering Company, A. W. Moore, Proprietor;

And that the said N. O. Nelson Manufacturing Company is a corporation, domiciled in and having its principal place of business in the City of Memphis, State of Tennessee;

[fol. 2] And that said Intervenor now reserving unto itself all manner of benefit and exception to the many errors and inaccuracies contained in the original Bill of Complaint exhibited against the said Acme Engineering Company and

others, for answer unto said Bill of Complaint filed herein, or unto so much or such parts thereof as this Intervenor is advised is material for it to make answer unto, answering says:

I

Intervenor admits that under date of October 18th, 1926, the Complainant, Natchez Investment Company, Inc., entered into a certain agreement or contract with the Defendants, J. V. & R. T. Burkes, of New Orleans, Louisiana, for the construction of a certain building at Natchez, Mississippi, known as Project #640 on the files of Weiss, Dreyfous & Seiferth, Inc., Architects of New Orleans, Louisiana, a copy of which agreement or contract is filed with the original Bill of Complaint filed herein and marked Exhibit "A" thereto, and which Exhibit "A" filed with said original Bill of Complaint is hereby adopted and made a part of this answer and of this Intervenor's Cross-Bill, and is prayed to be taken as a part hereof, the same as if copied herein and the same is hereby made Exhibit "A" to this Answer and this Intervenor's Cross-Bill. Intervenor further admits and on its part specifically charges and avers that said contract and agreement for the construction of said building in Project #640, above mentioned, has as a part thereof certain specifications compiled by Weiss, Dreyfous & Seiferth, Architects and referred to in said contract and made a part thereof, a copy of which said specifications is filed with said original Bill of Complaint and marked Exhibit "B" thereto. And this Intervenor adopts and makes a part of this Answer and its Cross-Bill said copy of said specifications, filed as Exhibit "B" to the original Bill of Complaint, and specifi- [fol. 3] cally charges and avers on its part that said specifications were a part of said contract and on its part adopts the said Exhibit "B" to the original Bill of Complaint as Exhibit "B" to this answer and this Intervenor's Cross Bill and makes the same a part of this Answer and Cross-Bill as fully as if the same were copied herein.

II

Said Intervenor further admits that said specifications contain one hundred and twenty-six (126) numbered pages, numbered from #1 to #126 inclusive, and also contained three pages preceding page #1, and are all bound

in a binder marked "Plans #640—Specifications for the Eola Hotel, a seven-story Fire Proof Building to be erected in Natchez, Mississippi," and that of said specifications on pages #18 and #19 thereof appeared the following clauses:

"Article 30

It shall be the obligation of every contractor and sub-contractor estimating upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architects; contractor likewise to pay the cost of any required recordation of contract and bond and the cost of any required cancellation of the same. He shall also secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract.

The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the Owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi, and shall [fol. 4] provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary.

Guarantee: It is the intent of the Architects to secure first class, permanent material and construction, and to this end each contractor will be held responsible for and must rectify all defects discovered in his work within one year after completion of the entire structure and its acceptance by the Architect. Should any material or workmanship called for by these specifications, be of such a nature as to render this guarantee impossible, notice of this effect must be served in writing upon the Architects previous to the signature of contractor; failure to do so will be construed as tacit agreement to the strictest terms of this guarantee.

Obligations of Bondsmen: The contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contracts covering the work executed hereunder, and the Owner and the Architects reserve the right to make all desirable changes, alterations

and additions, under the conditions and in the manner hereinbefore described, without in any measure affecting the liability of the bondsmen or releasing them from any of their obligations hereunder. The Owner and the Architect reserve the right to make such changes, alterations, and additions in the manner specified without notice to the contractor's surety, and waiver of such notice shall not affect the validity of the bond.

The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as guarantors, separately and in solido with the contractors of the fulfilment of the terms of the foregoing."

[fol. 5] And this Intervenor on its part specifically charges that said specifications include the foregoing alleged and quoted clauses.

III

This Intervenor further admits and on its part specifically charges and avers that on October 20th, 1926, said J. V. & R. T. Burkes, in compliance with said contract and the foregoing quoted provisions of the contract and specifications to furnish a bond to secure the Owner the faithful performance of the contract, did furnish such bond with the Hartford Accident and Indemnity Company of Hartford, Connecticut, as surety thereon, and the copy of said bond filed as Exhibit "C" to said original Bill of Complaint and made a part thereof is by this Intervenor alleged to be a copy of such bond and the same is now made a part of this Intervenor's Answer and Cross-Bill, and made Exhibit "C" hereto, as fully as if copied herein, and said Intervenor further admits, charges and avers that said bond, among other provisions contained therein, made the said contract, Exhibit "A" and specifications, Exhibit "B", parts of said bond; and that said bond incorporated said contract and specifications in the terms, stipulations and conditions of said bond; and that said bond contains, among other clauses, the following:

"Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the contract) dated October 18th, 1926, to construct "Eola Hotel" building as per plans and specifications #640 as prepared

by Weiss, Dreyfous & Seiferth, Architects, New Orleans, Louisiana, a copy of which is or may be attached hereto and is hereby referred to and made a part hereof."

IV

Intervenor admits and charges and avers that the said J. V. & R. T. Burkes proceeded to construct the said Eola [fol. 6] Hotel Building under said contract and specifications and admits that the Natchez Investment Company accepted said Hotel Building on or about the 10th day of August, 1927, but avers that it is not acquainted with the terms of the agreement under which the construction of said Hotel Building was accepted, but avers that any such acceptance was conditional, only; and neither admits nor denies that such an agreement was made upon the acceptance of said Building, as is alleged in paragraph #4 of the original Bill of Complaint, but demands strict proof of the terms of such agreement, both on the part of said Complainant and of J. V. & R. T. Burkes, Defendants in the original Bill of Complaint.

[fol. 7] Cross-bill

And this Intervenor having made full answer to the Bill of Complaint filed herein makes its Answer a Cross-Bill, reiterating and recharging all the averments in said Answer contained, for causes of complaint by way of Cross-Bill herein against said Complainant and all parties to said suit, and for Cross Bill of Complaint Cross-Complainant respectfully shows unto the Court the following, to-wit:

(1)

That Cross-Complainant is a corporation, domiciled and having its principal place of business in the City of Memphis and State of Tennessee, and at all times mentioned herein one A. W. Moore, was proprietor of and conducted a plumbing business under the name of Acme Engineering Company with its principal office and place of business in the City of Memphis and State of Tennessee, and the names and addresses of the Cross-Defendants to this Cross-Bill of Complain' are, as follows:

Natchez Investment Company, a corporation under the Laws of the State of Louisiana, qualified and doing busi-

ness in the State of Mississippi and having its principal place of business at Natchez, Mississippi; J. V. Burkes and R. T. Burkes, composing the partnership of J. V. & R. T. Burkes, of New Orleans, Louisiana, whose postoffice address is New Orleans Bank Building, New Orleans, Louisiana; J. V. Bartlette, Trustee in Bankruptcy for the Bankrupt partnership of J. V. & R. T. Burkes and Trustee for the indiyiduals in bankruptcy, appointed by the United States District Court for the Eastern District of Louisiana, for Cause #3355 on the Docket of Edward J. Thilborger, Referee in Bankruptcy, New Orleans, Louisiana, said Trustee's postoffice address being New Orleans Credit Men's Association, New Orleans, Louisiana; Hartford Accident & Indemnity Company of Hartford, Connecticut, [fol. 8] whose postoffice address in Hartford, Connecticut; R. Lee Parker, Jr., of Natchez, Mississippi; R. Scudamore, of Natchez, Mississippi; Natchez Brick Company, a partnership composed of R. Lee Parker, Jr., and R. Hicks Parker, both of Natchez, Mississippi; Williamson-Greer, a partnership composed of Walter Williamson and A. A. Greer, both of Dallas, Texas; The R. C. Lieb Company of Atlanta, Georgia; New Orleans Bank & Trust Company, of New Orleans, Louisiana; Feltus Bros. Hardware Company, of Natchez, Mississippi; Enochs Lumber & Mfg. Company, a corporation of Jackson, Mississippi, domiciled at Jackson, Mississippi; the Capitol Paint & Glass Company, a corporation domiciled at Jackson, Mississippi; the Southern C. F. Co., Inc., of Atlanta, Georgia; Chamberlain Metal Weather Strip Company, a corporation of St. Louis, Missouri; Hockaday, Inc., of Chicago, Illinois; National Show Case Company, of Columbus, Georgia; O. L. Bunn, doing business as Bunn Electric Company of New Orleans, Louisiaia; Gibbons & Gordon, Inc., of New Orleans, Louisiana; Woodward-Wight Company, Ltd., of New Orleans, Louisiana; Schultz Cabinet Works, of New Orleans, Louisiana; Natchez Drug Company of Natchez, Mississippi; Truscon Steel Company, of Youngstown, Ohio; Geisenberger Bros. Drug Company of Natchez, Mississippi; M. P. Phelan, of Natchez, Mississippi; and St. Bernard Cypress Co. Ltd., of Arabi, Louisiana.

(2)

That under date of October 18th, 1926, said Defendants, J. V. & R. T. Burkes, entered into a certain contract and

agreement in writing with the Cross-Defendant, Natchez Investment Co., Inc. for the construction of said Eola Hotel Building at Natchez, Mississippi, as alleged in said Bill of Complaint and the Answer of this Cross-Complainant as Intervenor in this cause, which contract was designated and known as Project #640 on the files of Weiss, Drey-
[fol. 9] fous & Seiferth, Inc., Architects, at New Orleans, Louisiana, the copy of which said contract has been filed with the original Bill of Complaint in this cause and has been made a part thereof, together with the specifications compiled by the Architects and referred to in said Contract and all of same have been made Exhibits to this Cross-Complainant's Answer and are now made Exhibits to this Cross-Complainant's Cross Bill of Complaint, and are adopted and made a part hereof as fully as if copied herein.

(3)

That in compliance with the terms of said Contract and said Specifications, said defendants, J. V. & R. T. Burkes, entered into a Bond in favor of said Cross-Defendant, Natchez Investment Company, Inc., in the sum of Three Hundred and Sixteen Thousand Eight Hundred and Twenty-two and no/100 ($316,822.00) Dollars to secure said Natchez Investment Company, Inc., the faithful performance of said contract, with the Hartford Accident & Indemnity Company of Hartford, Connecticut, as Surety thereon—the said Natchez Investment Company, Inc., being the owner of the property upon which said hotel building was to be erected and being the owner of said proposed hotel building. A copy of said bond having been filed as an Exhibit to the original Bill of Complaint herein and adopted as a part of and made an Exhibit to this Cross-Complainant's Answer, is hereby adopted and made a part of this Cross-Bill of Complaint and is made an Exhibit to this Cross-Bill of Complaint. That as alleged in said Answer and as now charged in this Cross-Bill of Complaint, said Contract and Specifications were made a part of said Bond and the terms and conditions of said Contract and Specifications are incorporated in said Bond so far as they affect the interest of this Cross-Complainant the same as though
[fol. 10] fully written therein, and that said Bond consisted of the Bond, said Contract and said Specifications, and also

of Chapter 128 of the Laws of Mississippi of 1918; and that said Bond was entered into by the parties thereto in contemplation of said Chapter 128 of the Laws of Mississippi, 1918, and is such a bond as is mentioned in Section #3, of said Statute, and is a bond guaranteeing the faithful performance of said Contract.

(4)

That said Defendants, J. V. & R. T. Burkes, under their said contract and agreement with the Cross-Complainant, Natchez Investment Company, Inc., and under the terms and stipulations and conditions of the specifications made a part of said contract, and the bond with the Hartford Accident & Indemnity Company, as Surety, in compliance therewith, proceeded to construct said Eola Hotel Building, and Cross-Complainant charges that said hotel building was constructed by said Defendants but that same has never been accepted by the Natchez Investment Company, Inc., and that full settlement has not been made by the said Natchez Investment Company, Inc., to and with the said J. V. & R. T. Burkes, Contractors.

(5)-A

That on the 18th day of October, 1926, the said Defendants, J. V. & R. T. Burkes, General Contractors, for the construction of said Eola Hotel Building and the said Acme Engineering Co. by A. W. Moore made and entered into a certain contract in writing whereby it was contracted and agreed by and between the parties that the said Acme Engineering Co., as Sub-contractor under the said J. V. & R. T. Burkes, should furnish all labor and material and install the plumbing, heating and ventilating system in and about the erection and construction of the Eola Hotel Building at Natchez, Mississippi, as in said contract provided [fol. 11] and particularly specified; and that for said labor and materials furnished in doing such work and for the total consideration of said contract, the said J. V. & R. T. Burkes therein and thereby promised to pay to the said Acme Engineering Co. the total sum and consideration of Forty-six Thousand Five Hundred Forty-nine and 88/100 ($46,549.88) Dollars. The contract so made and entered into in writing by the parties was a formal and binding obligation upon each and in accordance with the terms and

conditions therein specified; and that the said A. W. Moore, Proprietor of Acme Engineering Co., was thereby bound and obligated, to do and perform the work and furnish the labor, materials and supplies necessary for the completion of the work therein specified to be done, and that thereby the said Burkes were bound and obligated to pay in accordance with the terms and conditions therein provided to the said A. W. Moore for such work, labor, materials and supplies said total consideration of $46,549.88; that a copy of said contract in writing between the said Acme Engineering Co. and the said J. V. & R. T. Burkes is filed herewith as Exhibit "F" to this Cross-Bill and the same is made a part hereof for all intents and purposes as fully as if copied herein, and is hereby sued upon; and reference is hereby made to the specifications for construction of said hotel building already filed herewith and hereinabove referred to for the specifications of the work contracted to be done by the said A. W. Moore, Proprietor of Acme Engineering Co., under said Contract. That the said A. W. Moore, Proprietor of Acme Engineering Co., completed and performed on his part all his obligations under said contract and did and performed all the work, furnished all the labor, materials and supplies necessary for the completion of the work provided to be done and performed in said contract and performed all of same within the time provided and re-
[fol. 12] quired by said contract; but that the said Defendants, J. V. & R. T. Burkes, have failed on their part to pay unto the said A. W. Moore, Proprietor of Acme Engineering Co., the full consideration due and owing by them unto him in accordance with the terms and provisions of said Contract; and that there remains due and owing by the said J. V. & R. T. Burkes a balance on account of the consideration provided to be paid in said contract of the total principal sum of Five Thousand Nine Hundred Seventeen and 53/100 ($5,917.53) Dollars, together with interest at the rate of six and one-half per cent per annum from August 17th, 1927, as hereinafter more particularly shown; and that demand has been made upon the said Defendants, J. V. & R. T. Burkes, to pay said sum of money due and owing by them as aforesaid to your Intervenor; but that though said sum is long since past due and owing and should have been paid, said Defendants, J. V. & R. T. Burkes, to do have wholly failed and refused and still fail

and refuse, and Intervenor and Cross-Complainant charges and avers that the balance of the principal sum of Five Thousand Nine Hundred Seventeen and 53/100 ($5,917.53) Dollars and interest and attorney's fees, as hereinbefore shown, is due and owing by the said J. V. & R. T. Burkes and by the Hartford Accident & Indemnity Company as Surety on the Bond aforesaid; and Cross-Complainant further shows and avers that all work, labor, materials and supplies so furnished under said contract by the said A. W. Moore, Proprietor of Acme Engineering Co., were used by the said J. V. & R. T. Burkes in the erection and construction of said Eola Hotel Building and are now incorporated therein.

(5)-B

That after the said A. W. Moore, Proprietor of Acme Engineering Co., had on his part fulfilled and completed his [fol. 13] said sub-contract and agreement, hereinabove mentioned, the said J. V. & R. T. Burkes, to evidence and provide for the payment of the said balance due and owing thereon, at New Orleans, Louisiana, on June 17th, 1927, made, executed and delivered unto the said A. W. Moore, Proprietor of Acme Engineering Co., their joint and several promissory note of that date, payable August 17, 1927, to the order of the said Acme Engineering Co. in said principal sum of $5,917.53 the same bearing interest at the rate of six and one-half per cent per annum from maturity until paid, and providing on its face that in the event default is made in the payment of said note at maturity and is placed in the hands of an attorney for collection, or suit is brought on the same, then an additional amount of twenty per cent on the principal and interest of said note shall be added to the same as collection fees, therein agreed upon as liquidated damages and to further secure the payment of said note and indebtedness, the said J. V. & R. T. Burkes attached thereto and pledged and delivered to the said A. W. Moore thirty-five and one-half (35½) shares of the Corporate Capital Stock, being Certificate #6, of the Commercial National Bank of Hattiesburg, Mississippi. A copy of said promissory note is hereunto annexed and attached as Exhibit "G" hereto and made a part hereof for all purposes as fully as if copied herein and the original thereof will be offered in evidence at the hearing of this cause.

(5)-C

That the said A. W. Moore, Proprietor of said Acme Engineering Co., for value received, and for valuable considerations and before the maturity of said note, sold, assigned, transferred and delivered said note, together with the collateral security therewith pledged and thereunto attached and his said claim, together with all security apper- [fol. 14] taining to the same, unto your Cross-Complainant, the said N. O. Nelson Manufacturing Company, and that the said N. O. Nelson Manufacturing Company is now the legal holder and owner of said note in due course and is the legal owner and holder of said claim against the said J. V. & R. T. Burkes, Natchez Investment Company, Inc., Hartford Accident & Indemnity Company and all parties affected by said claim for the balance due and owing as aforesaid under said Sub-contract and is entitled to all the rights and remedies for the enforcement and collection of said claim and note which were had or held by the said A. W. Moore and to all rights, liens, privileges and securities unto the same in anywise appertaining or belonging.

(6)

That on the 17th day of August, 1929, Cross-Complainant gave notice to the said Natchez Investment Company, Inc., and others, in conformith with Chapter 128 of the Laws of Mississippi of 1918 that the said A. W. Moore had furnished said materials and labor and done and performed the work provided to be done and performed and furnished under said Sub-contract and that the amount due therefor was unpaid and that your Cross-Complainant was the Assignee of said claim and entitled to all rights and benefits thereunder, a copy of which said notice so given is hereunto attached and annexed and made Exhibit "D" to this Cross-Bill of Complaint.

(7)

Cross-Complainant further charges and avers that the Bond executed by the Defendants, J. V. & R. T. Burkes with the Hartford Accident & Indemnity Company as Surety thereon was given in compliance as hereinabove alleged [fol. 15] with the Contract and specifications for the construction of said Eola Hotel Building and in compliance

and in conformity with Chapter 128 of the Laws of Mississippi of 1918. That under the terms and conditions of said contract, specifications and bond hereinabove mentioned and under the Laws of the State of Mississippi said Defendants, J. V. & R. T. Burkes became obligated to promptly pay to said A. W. Moore, proprietor of Acme Engineering Co., the amount due him for said materials and labor furnished in and above the erection and construction of said Eola Hotel Building under said Sub-contract; and upon default in the payment thereof, the said Defendants J. V. & R. T. Burkes, and the Defendant, Hartford Accident & Indemnity Company, became then and there obligated under said bond to pay to the said A. W. Moore all sums due and unpaid to him by the said J. V. & R. T. Burkes for labor and materials furnished in and about the erection and construction of said Eola Hotel Building. Cross-Complainant further charges that default has been made by the said J. V. & R. T. Burkes in payment to the said Moore and unto your Cross-Complainant as Assignee of the said A. W. Moore for said materials furnished as hereinabove alleged to the principal sum and amount of $5,917.53 and interest and attorney's fees, for the payment of which the Defendant, Hartford Accident & Indemnity Company, is bound, obligated and liable to your Cross-Complainant as the Assignee of the said A. W. Moore; and that there is now due, owing and unpaid to your Cross-Complainant by the Defendant, Hartford Accident & Indemnity Company the said principal sum of $5,917.53, with interest thereon at the rate of six and one-half per cent per annum from August 17th, 1927, and twenty per cent on said total principal and interest as attorney's fees for which Cross-Complainant is entitled to a judgment and decree.

[fol. 16] (18)

The Premises Considered, Cross-Complainant prays that all parties made defendant to this Cross-Bill of Complaint be summoned and cited by proper process of this honorable Court to be and appear at the September Rules, 1929, thereof, then and there to answer or demur to this Cross-Bill of Complaint, answer under oath being waived and dispersed with, and that upon the hearing of this cause, the Court will grant unto Cross-Complainant personal judgment and decree against the Defendant, J. V. & R. T.

Burkes, and the Trustee in Bankruptcy, and the Defendant, Hartford Accident & Indemnity Company, in the full principal sum and amount of Five Thousand Nine Hundred Seventeen and 53/100 ($5,917.53) Dollars, and interest as hereinabove alleged to be due, and twenty per cent thereon attorney's fees in this cause by it incurred; and that this honorable Court will render a Decree against the Natchez Investment Company, Inc., in favor of said Cross-Complainant for its proportionate share of the amount remaining owning by said Natchez Investment Company, Inc., to said J. V. & R. T. Burkes on account of the building contract hereinabove set forth, and, to this extent, declare and establish a lien in favor of Cross-Complainant against and upon said Eola Hotel Building and premises and all funds in the hands of said Natchez Investment Company, Inc., owing to said J. V. & R. T. Burkes, and a first prior lien against the Eola Hotel building as being prior in right to the mortgages and deeds of trust of record hereinabove recited and mentioned.

[fol. 17] IN CHANCERY COURT OF ADAMS COUNTY

ANSWER OF HARTFORD ACCIDENT & INDEMNITY CO.

8

This defendant admits that Section 2, Chapter 128 of the Laws of 1918 contains a provision alleged in paragraph 8 of the bill and says that the assignment made by J. V. and R. T. Burkes to the New Orleans Bank and Trust Company is subordinate to the rights and claims of subcontractors and materialmen and further says that said Section 2 is unconstitutional and void as will be hereinafter shown.

9

This defendant denies, answering paragraph nine, that the complainant is entitled to bring this suit against it and the contractors and denies that it has a right to bring in all subcontractors and materialmen having claims for material and labor furnished in the building of the Eola Hotel and says that the bond issued by it was not a bond for the faithful performance of the contract but simply a bond of indemnity.

* * * * * * * *

This defendant denies that the parties named in the original bill as furnishing material in connection with said project have not been paid and says that they are not entitled to recover from this defendant for the same even if not paid.

Further answering the bill of complaint this defendant says that neither the original complainant or any other person is entitled to recover from it because it says that its bond is not a performance bond within the meaning of Chapter 128 of the Laws of 1918 nor does its bond guarantee the faithful performance of the contract by J. V. & R. T. Burkes but that said bond is a pure bond of indemnity, running solely in favor of the Natchez Investment [fol. 18] Company, Inc., who can not sue on it until they have actually paid out money as a result of the default of the contractors.

Further answering the bill of complaint this defendant says that to construe said bond as coming with Chapter 128 of the Laws of 1918 is to render that law invalid and void because it is an unwarranted interference with the freedom of contract as against the owner of property, contractors and sureties and that such a construction violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Further answering said bill this defendant says that Section 2 of Chapter 128 of the Laws of 1918 is unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States, Section 1 thereof, in that it is an unwarranted interference with the freedom of contract of the contractor.

Further answering said bill this defendant says that Chapter 128 of the Laws of 1918 is invalid and void and unconstitutional—

A. Because it is not within the power of the Legislature of the State of Mississippi to create a contract between parties sui juris.

B. Because said Statute constitutes the taking of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section Fourteen of the Constitution of the State of Mississippi.

C. Because said law attempts to make a contract between persons without their consent and to give a class of third persons rights without the consent of the original parties to the contract.

[fol. 19] D. Because said law denies to the contractor and his surety the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

E. Because it is not within the police power of the state even under the Federal Constitution to pass such an act as Chapter 128 of the Laws of 1918.

Further answering the original bill this defendant says that the bond executed by it, in paragraph 1 of the conditions, provided:

"The Obligee, shall, at the times and in the manner specified in the contract, fully comply with all the terms thereof and if the Obligee default in the performance of any matter or thing agreed or required in this bond, or in the contract, the Surety shall thereupon be relieved of all liability hereunder."

And this defendant says that this condition of the bond was breached by the obligee, the Natchez Investment Company, Inc., in this, to-wit: That it did not pay the contractors in cash according to the terms of the contract nor did it furnish in cash, as was required by the contract, the additional sums over and above the first mortgage bond issue which additional sums complainant well knew were necessary to the full completion of the job and this defendant alleges that the complainant fraudulently entered into a conspiracy with J. V. & R. T. Burkes and with the architects on this job to deceive the Canal Bank and Trust Company Trustee under the first mortgage bond issue and all persons dealing with complainant and with J. V. & R. T. Burkes by giving to the said Contractors notes and other obligations in lieu of cash and by taking from the said con-
[fol. 20] tractors receipts showing the payment of monies, which in fact had not been paid and by causing false certificates to be made to the Canal Bank and Trust Company, Trustee, as to the amount of money which complainant had actually delivered to the architect and or the contractors for use in erection of the hotel and further says that by

reason of these acts the bond has been violated and voided, not only as to complainant but as to the materialmen and other persons holding claims against the said contractors.

[fol. 21] In Chancery Court of Adams County

[Title omitted]

Answer of the Hartford Accident and Indemnity Company to the Intervention of N. O. Nelson Manufacturing Company, Assignee of A. W. Moore, Trading as Acme Engineering Company—Filed July 8, 1932

Now comes the Hartford Accident & Indemnity Company and for answer to the petition of intervention and cross bill of the N. O. Nelson Manufacturing Company, assignee of A. W. Moore, trading as Acme Engineering Company says:

This defendant adopts as its answer to said intervention and cross bill of N. O. Nelson Manufacturing Company its answer to the original bill of complaint heretofore filed in this cause.

Further answering this defendant says that the bond sued on provides that there shall be no right of action in favor of any one save the named obligee to-wit, Natchez Investment Company, Inc., and that to permit the N. O. Nelson Manufacturing Company to sue on said bond, contrary to the provisions of said bond, violates the freedom of contract guaranteed to this defendant and all other persons by Section 1 of the Fourteenth Amendment to the Con-
[fol. 22] stitution of the United States.

Further answering this defendant denies the right of intervenor, N. O. Nelson Manufacturing Company, to intervene and recover in this cause because it says that said intervenor took certain collateral, to-wit, thirty-five and one-half shares of the capital stock of the Commercial National Bank of Hattiesburg, Mississippi, evidenced by stock certificate No. 6 of said Bank and that notwithstanding it had the right to do so said intervenor did not enforce the collection of said collateral by proper foreclosure thereof and permitted the collateral to go unrealized upon up to the time the Commercial National Bank of Hattiesburg, Mississippi, failed.

This defendant says that at the time of the maturity of the note of A. W. Moore to N. O. Nelson Manufacturing Company the said thirty-five and one-half shares of stock had a market value of more than $100.00 per share and this defendant shows that the note of J. V. and R. T. Burkes to the Acme Engineering Company and assigned by Acme Engineering Company to N. O. Nelson Manufacturing Company was due August 17, 1927, and that the Commercial National Bank of Hattiesburg, Mississippi, did not close its doors until the — day of ——, 1931, and this defendant says that said intervenor should be charged with the value of the above security at its market value as of August 17, 1927.

This defendant further denies that the material and labor sued for by N. O. Nelson Manufacturing Company went into the erection and construction of the Eola Hotel and denies that J. V. and R. T. Burkes or this defendant owe the sum of $5,917.53 to either the Acme Engineering Company or to N. O. Nelson Manufacturing Company and denies that it owes to either any part of said sum.

[fol. 23] And now having fully answered this defendant prays to be dismissed with its costs.

Wells, Jones, Wells and Lipscomb, Attorneys for Hartford Accident & Indemnity Company.

[File endorsement omitted.]

[fol. 24] In Chancery Court of Adams County

[Title omitted]

Agreed Statement of Facts Between Hartford Accident & Indemnity Company and N. O. Nelson Mfg. Co.—Filed Aug. 8, 1932

The following facts are admitted to be correct on the part of N. O. Nelson Mfg. Co., through its Attorneys, Brandon & Brandon, and the Hartford Accident & Indemnity Company, through its attorney, L. Barrett Jones, in that certain cause styled Natchez Investment Company, Inc., vs. J. V. & R. T. Burkes, et al., Defendants, numbered #5323 on the General Docket of the Chancery Court of

Adams County, Mississippi, and this Agreement may be filed in said cause as an evidentiary matter, and the parties hereto agree to be bound by this Agreement when the same is so filed in said cause as to the facts set forth and covered herein, together with the necessary conclusion deducible from said facts herein stated.

That, under date of October 18th, 1926, the Natchez Investment Company, Inc., entered into a certain agreement or contract with the Defendants, J. V. & R. T. Burkes, of New Orleans, Louisiana, for the construction of a certain building at Natchez, Mississippi, known as Project #640 on the files of Weiss, Dreyfous & Seiferth, Inc., Architects, [fol. 25] of New Orleans, Louisiana, as per copy of which agreement or contract was filed with the original Bill of Complaint filed herein and marked Exhibit "A" thereto, and that same may be offered in evidence without further identification or verification; and that the Natchez Investment Company, Inc., was a corporation, incorporated under the Laws of the State of Louisiana and was such at all times mentioned in the pleadings in this cause, and that the said J. V. & R. T. Burkes was a co-partnership composed of J. V. Burkes and R. T. Burkes, doing a general building contractors business, residents of New Orleans, Louisiana, and that the Hartford Accident & Indemnity Company is a surety company doing a general surety business in the State of Mississippi in said State and under the Laws of said State and was so qualified at all times mentioned in the pleadings filed in this case.

That the said Contract and Agreement for the construction of said building, which was the Eola Hotel Building, at Natchez, Mississippi, was project #640, as above mentioned, had as a part thereof certain Specifications compiled by Weiss, Dreyfous & Seiferth, Inc., Architects, and referred to in said Contract and made a part thereof, and that the copy of said Specifications filed with the original Bill of Complaint herein and marked Exhibit "B" thereto is correct, and that same may be offered in evidence without further identification or verification.

That on the 20th day of October, 1926, said J. V. & R. T. Burkes, in compliance with said contract and specifications, furnished the Bond mentioned in the original Bill of Complaint, and as shown by copy thereof filed as Exhibit "C" to said original Bill of Complaint and that said copy so

filed as Exhibit is correct and same may be offered in evidence without further identification or verification; and that the Hartford Accident & Indemnity Company was the [fol. 26] Surety on said Bond for a valuable consideration as a paid surety, and on said date executed the same as Surety. That, thereafter, said J. V. & R. T. Burkes, Contractors, proceeded to construct the said Eola Hotel Building under said Contract and Specifications, and that said building was conditionally accepted by said Natchez Investment Company, Inc., on or about the 10th day of August, 1927; that the Natchez Investment Company, Inc., was the owner of the property upon which said hotel building was erected and was the owner of same at the time this cause and suit was instituted.

That on the 18th day of October, 1926, the said Defendants, J. V. & R. T. Burkes, General Contractors, for the construction of said Eola Hotel Building, and the said Acme Engineering Co. by A. W. Moore made and entered into a certain contract in writing whereby it was contracted and agreed by and between the parties that the said Acme Engineering Co., as Sub-contractor under the said J. V. & R. T. Burkes, should furnish all labor and material and install the plumbing, heating and ventilating system in and about the erection and construction of the Eola Hotel Building, at Natchez, Mississippi, as in said contract provided and particularly specified; and that for said labor and materials furnished in doing such work and for the total consideration of said contract, the said J. V. & R. T. Burkes therein and thereby promised to pay to the said Acme Engineering Co. the total sum and consideration of Forty Six Thousand Five Hundred Forty nine and 88/100 ($46,549.88) Dollars. The contract so made and entered into in writing by the parties was a formal and binding obligation upon each and in accordance with the terms and conditions therein specified; and that the said A. W. Moore, Proprietor of Acme Engineering Co., was thereby bound and obligated to do and [fol. 27] perform the work and furnish the labor, material and supplies necessary for the completion of the work therein specified to be done, and that thereby the said Burkes were bound and obligated to pay in accordance with the terms and conditions therein provided to the said A. W. Moore for such work, labor, materials and supplies said total consideration of $46,549.88; that a copy of said con-

tract in writing between said Acme Engineering Co. and said J. V. & R. T. Burkes was filed with the Intervention and Cross-Bill of N. O. Nelson Mfg. Co. as Exhibit "F" thereto and that same is true and correct and may be offered in evidence without further identification or verification. That said A. W. Moore, Proprietor of the Acme Engineering Co., completed and performed on his part all his obligations under said Contract and did and performed all the work and furnished all the labor, materials and supplies necessary for the completion of the work provided to be done and performed in said contract, and performed all of said — within the time provided and required by said contract; but that said J. V. & R. T. Burkes, Defendants, failed on their part to pay unto said A. W. Moore, Proprietor of Acme Engineering Co.; the full consideration due and owing by them unto him in accordance with the terms and provisions of said contract; and that there remains due and owing by the said J. V. & R. T. Burkes a balance on account of the consideration provided to be paid in said contract of a total principal sum of Five Thousand Nine Hundred Seventeen and 53/100 ($5,917.53) Dollars; together with interest thereon as sued for herein by the Cross-Complainant N. O. Nelson Mfg. Co. from August 17th, 1927; and that the said J. V. & R. T. Burkes are now indebted unto the said N. O. Nelson Mfg. Co. for said balance with interest; and that the prices and sums and the [fol. 28] total consideration for said contract, work, labor, and material are just, fair, and reasonable and at prices and sums agreed to by and between said J. V. & R. T. Burkes and said A. W. Moore, Proprietor of Acme Engineering Co.; and further that all such labor, material, and work alleged in the Cross-Bill of Complaint to have been so sold and furnished were received by and used by the said J. V. & R. T. Burkes in the erection and construction of said Eola Hotel Building under said Project #640, and that all such labor and materials are now incorporated in said Eola Hotel Building.

That after the said A. W. Moore, Proprietor of Acme Engineering Co., had on his part fulfilled and completed his said sub-contract and agreement, hereinabove mentioned, the said J. V. & R. T. Burkes, to evidence and provide for the payment of the balance due and owing thereon, at New Orleans, Louisiana, on June 17th, 1927, made, executed, and

delivered unto said A. W. Moore, Proprietor of Acme Engineering Co., their joint and several promissory note of that date payable August 17th, 1927, to the order of said Acme Engineering Co., in said principal sum of $5,917.53, and to further secure the payment of said note and indebtedness, the said J. V. & R. T. Burkes attached thereto and pledged and delivered to the said A. W. Moore thirty five and one-half (35½) shares of the Corporate Capital Stock, being Certificate #6, of the Commercial National Bank, of Hattiesburg, Mississippi; that a copy of said Promissory Note is attached to the Cross-Bill of Complaint filed herein as Exhibit "G" thereto, and that the same is a true and correct copy and may be offered in evidence without further identification or verification.

That the said A. W. Moore, Proprietor of said Acme Engineering Co., thereafter, for value received and for valuable consideration, and before the maturity of said note, [fol. 29] sold, assigned, transferred, and delivered said note, together with the collateral security therewith pledged and thereunto attached and his said claim against said J. V. & R. T. Burkes, together with all securities appertaining to the same, unto said N. O. Nelson Mfg. Co., the Cross-Complainant under this Agreement, and that the said N. O. Nelson Mfg. Co. is now the legal holder ond owner of said note in due course and is the legal owner and holder of said claim against J. V. & R. T. Burkes, the Natchez Investment Company, Inc., the Hartford Accident & Indemnity Company, and all parties affected by said claim for the balance due and owing as aforesaid under said sub-contract and is entitled to all the rights and remedies for the enforcement and collection of said claim and note which were had or held by the said A. W. Moore and to all rights, liens, privileges, and securities unto the same in anywise appertaining or belonging.

That the said N. O. Nelson Mfg. Co. had made due demand upon the said J. V. & R. T. Burkes and upon the said Hartford Accident & Indemnity Company for payment of the aforesaid demanded sum, payment of which has been refused by the said J. V. & R. T. Burkes and said Hartford Accident & Indemnity Company.

That on the 17th day of August, 1929, said N. O. Nelson Mfg. Co. gave notice to the Natchez Investment Company, Inc., and others, the owner of the Eola Hotel Building and

the property upon which same is situated, in strict conformity with Chapter 128 of the Laws of the State of Mississippi of 1918, that said A. W. Moore had furnished said materials and labor and done and performed the work provided to be done and performed and furnished under said sub-contract, and that the amount due therefor was unpaid, and that the said N. O. Nelson Mfg. Co. was the Assignee of [fol. 30] said claim and entitled to all rights and benefits thereunder; and that the said N. O. Nelson Mfg. Co. fully complied with the provisions of Chapter 128 of the Laws of Mississippi of 1918 for the giving of notice to the owner of the amount owing for materials used in the construction of said Eola Hotel Building.

That this cause was originally brought and instituted by the Natchez Investment Company, Inc., as Complainant against J. V. & R. T. Burkes, Hartford Accident & Indemnity Company, and various and sundry sub-contractors and materialmen, for the purpose, amongst other things, of requiring and having all subcontractors and materialmen and their assignees to appear in said cause and to assert and establish all liens and claims they might have for labor; work, and materials furnished in and about the erection and construction of said Eola Hotel Building in Natchez, Adams County, Mississippi; that, though the said A. W. Moore, as Proprietor of Acme Engineering Company, was named as a Party Defendant in said cause and was cited to appear therein as one of such sub-contractors, yet at the time said cause was instituted, said Moore had already parted with his interest in said note, claim and demand, and had also been adjudged a bankrupt in the Federal District Court of Tennessee; that the said N. O. Nelson Mfg. Co. was not named as a party in said cause and had not notice or knowledge of the pendency of the same until about the first day of August, 1929, when it was informed thereof and immediately filed its Petition for leave to intervene herein.

That the said J. V. & R. T. Burkes knew that the said N. O. Nelson Mfg. Co. was the Assignee of said Moore, as hereinabove set forth, and that it was the owner and holder in due course of said note; but that said J. V. & R. T. Burkes informed said N. O. Nelson Mfg. Co. of the fact of the [fol. 31] pendency of this cause; that at the time that said N. O. Nelson Mfg. Co. filed its Cross-Bill of Complaint and Intervention herein final settlement of said Contract has not been made or paid.

That if it should finally be held in this cause by the Court that the Bond hereinabove referred to as having been executed by the Hartford Accident & Indemnity Company as Surety on the terms and conditions as shown by the pleadings in this cause, was and is a Bond guaranteeing the faithful performance on the part of said J. V. & R. T. Burkes, Contractors, of their contract for the construction of said Eola Hotel Building, under said Project #640, as alleged by the pleadings in this cause, and same is still in force and that same is available to this claimant, then that said N. O. Nelson Mfg. Co. is *not* entitled to a Judgment against said Hartford Accident & Indemnity Company for the full amount herein sued for and demanded, as hereinabove agreed and as alleged in the Cross Bill of Complaint filed by said N. O. Nelson Mfg. Co.; but said Hartford Accident & Indemnity Company does not agree that it is additionally liable for attorney's fees to said N. O. Nelson Mfg. Co., but the question of liability for attorneys' fees is left to the Court as a matter of legal construction under said contract documents and bond; however, it is agreed that said N. O. Nelson Mfg. Co. has been required to come into this proceeding as assignee of A. W. Moore, doing business as Acme Engineering Co. for the enforcement and protection of its rights, and that it has been necessary for it to employ attorneys, to-wit: Brandon & Brandon, of Natchez, Mississippi, and that it has thereby incurred reasonable attorneys' fees for the services required and to be required for [fol. 32] the prosecution of its claim to final judgment; and that such proceedings have become necessary by reason of the failure of the Contractors, J. V. & R. T. Burkes, to pay the amount of their indebtedness to said N. O. Nelson Mfg. Co.

Nothing herein contained shall in anywise be taken as an agreement by the Hartford Accident & Indemnity Company that this is a concursus proceeding or a proceeding in anywise akin thereto, or that it was made necessary by the Hartford Accident & Indemnity Company, or that the Bond herein given by it was a Bond guaranteeing the faithful performance of the contract, or that its Bond is still in force, or that such Bond is available to this sub-contractor; but such matters are left to the Court for determination as a matter of legal construction on the proof, pleadings, contract documents, exhibits, bond, and law. It is further

Agreed that the said N. O. Nelson Mfg. Co. still has in its possession the said 35½ shares of the corporate capital stock of the Commercial National Bank of Hattiesburg, Mississippi, and that it has not to this date sold the same or disposed thereof; that said stock is tendered into Court for such disposition as the Court may direct.

That prior to the original institution of this suit by the Natchez Investment Company, but subsequent to the maturity of said promissory note, the said J. V. & R. T. Burkes had filed a voluntary Petition for adjudication as Bankrupts in the United States District Court at New Orleans, Louisiana; and that thereafter and thereupon the said N. O. Nelson Mfg. Co. asserted its lien and claim as pledged to said 35½ shares of the corporate capital stock of said bank, and said stock was on May 7, 1929 surrendered by the Trustee in Bankruptcy for J. V. & R. T. Burkes to said N. O. Nelson Mfg. Co., as being an asset of said J. V. [fol. 33] & R. T. Burkes in which there was no equity for other creditors. That, thereafter, and promptly upon said stock having been so surrendered to the said N. O. Nelson Mfg. Co., said N. O. Nelson diligently endeavored to dispose of said stock which it held as collateral for a fair price and toward the reduction of the indebtedness evidenced by said promissory note; but that there was no open market for said stock and said N. O. Nelson Mfg. Co. was unable to find a purchaser thereof for a fair consideration or to dispose of the same.

It is further Agreed that the entire record in the Chancery Court heretofore made in this cause, together with the Record in the Mississippi State Supreme Court in this Cause No. 5323, shall be considered a part of the record in this cause involving the Intervention claim and Cross-Bill of N. O. Nelson Mfg. Co., Assignee of A. W. Moore, etc., and that all evidence and testimony heretofore introduced in this cause No. 5323 shall be considered as evidence in this particular controversy on this particular claim as fully as if same had been formally offered and introduced herein.

It is further Agreed that all opinions rendered in the Supreme Court of the State of Mississippi in this cause on appeals shall be considered a part of this record for all purposes.

It is further Agreed that the setting down of this cause on the pleadings herein at this time shall not be taken under

the rule as an admission in and of itself that the averments in the answers are confessed or taken as evidence, the Respondent Hartford Accident and Indemnity Company waiving the right to have andy delay for the taking of depositions.

This the 8th day of August, A. D. 1932.

[fol. 34] Hartford Accident & Indemnity Co., by L. Barrett Jones. N. O. Nelson Mfg. Co., by G. H. Brandon.

[File endorsement omitted.]

[fol. 35] In Chancery Court of Adams County

C.#5323. B.#176

Natchez Investment Company, Inc., Complainant,

vs.

J. V. & R. T. Burkes and Hartford Accident & Indemnity Company et als, Defendants,

In the Matter of the Intervention, Answer, and Cross-bill of Complaint of N. O. Nelson Mfg. Co., Assignee of A. W. Moore, Doing Business as Acme Engineering Company

Decree—Filed Aug. 8, 1932

This cause coming for hearing on the Bill of Complaint filed herein and all pleadings filed herein, and on oral testimony and depositions and agreed statement of Facts as filed herein, and the Court having duly considered all the evidence and the record in this cause and being now fully advised in the premises doth Order, Adjudge, and Decree that the Bond herein sued on, executed by J. V. & R. T. Burkes as Principal and Hartford Accident & Indemnity Company, as Surety, by virtue of the Contract Documents and under the Law of the State of Mississippi, is a Bond guaranteeing the faithful performance of the contract for the erection and construction of the Eola Hotel Building in Natchez, Adams County, Mississippi, being Project No. 640 [fol. 36] on the files of Weiss, Dreyfous & Seiferth, Inc., Architects, of New Orleans, Louisiana, and that said Bond

now and at all times mentioned herein was and is still in full force and effect and that the Surety on said Bond, Hartford Accident & Indemnity Company of Hartford, Connecticut, is by this Court decreed to be liable on said Bond for the payment of the respective sums hereinafter set forth and decreed to be due and owing to N. O. Nelson Mfg. Co., as hereinafter set forth, and *and* that said J. V. & R. T. Burkes, as Principal, and Hartford Accident & Indemnity Company, jointly and severally, are liable in said sums to the said N. O. Nelson Mfg. Co., as Assignee of A. W. Moore, doing business as Acme Engineering Company.

It is further Ordered, Adjudged, and Decreed that the said Hartford Accident & Indemnity Company and said J. V. & R. T. Burkes are jointly and severally liable to said N. O. Nelson Mfg. Co. for interest on the amount sued for and demanded by the said N. O. Nelson Mfg. Co. in the sum and amount set forth hereinafter as for interest, and that such interest item has been calculated to the date of this Decree, and that said principal sum of indebtedness, with said added interest, and the total thereof, shall bear interest from and after this the date of this Decree at six (6%) per cent. per annum.

It is thereupon further Ordered, Adjudged, and Decreed that the said Intervenor and Cross-Complainant, N. O. Nelson Mfg. Co., as Assignee of A. W. Moore, doing business as Acme Engineering Co., do have and recover of, from, and against said J. V. Burkes, & R. T. Burkes and Hartford Accident and Indemnity Company, jointly and severally, Judgment for the principal of their claim and demand in the sum of Five Thousand Nine Hundred and Seventeen and 53/100 ($5,917.53) Dollars, and for interest [fol. 37] thereon to this date in the sum of One Thousand Seven Hundred and Sixty-six and 37/100 ($1,766.37) Dollars, total of Judgment here rendered, Seven Thousand, Six Hundred and Eighty-three and 90/100 ($7,683.90) Dollars; and it is further Ordered, Adjudged, and Decreed that the total of said Judgment hereinabove awarded shall bear interest at six (6%) per cent per annum from this date until paid, and that all costs accrued in this cause to be taxed be paid by said J. V. Burkes and said R. T. Burkes, and said Hartford Accident & Indemnity Company, for which let execution issue.

It is further Ordered, Adjudged, and Decreed that the said N. O. Nelson Mfg. Co., as Assignee of A. W. Moore, do further have and recover Judgment of, from, and against said J. V. Burkes and R. T. Burkes, jointly and severally, as for Attorney's fees incurred in this cause in the sum and amount of One Thousand Five Hundred and Thirty-six and 78/100 ($1,536.78) Dollars, together with interest thereon at the rate of 6% per annum from this date until paid—for which let execution issue.

It is further Ordered, Adjudged, and Decreed that all issues involved in this cause not determined heretofore or by this Decree, be and the same are hereby continued for hearing and determination at the January Term, 1932, of the Chancery Court of Adams County, Mississippi.

The Hartford Accident & Indemnity Company excepts to this Decree.

Any parties to the litigation interested in this Decree may have their appeal as provided by law.

Ordered, Adjudged, and Decreed in Term time at Natchez, Adams County, Mississippi, on this the 8th day of August, A. D. 1932.

R. W. Cutrer, Chancellor.

[fol. 38] [File endorsement omitted.]

[fol. 39] IN SUPREME COURT OF MISSISSIPPI, DIVISION A

No. 30507

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

N. O. NELSON MANUFACTURING COMPANY

OPINION—Filed May 1, 1933

(Not to be Reported in the State Reports)

COOK, J.:

This is the fourth time that some branch of this cause has been before this court. On the first appeal the cause was styled Hartford Accident & Indemnity Company vs. Nat-

chez Investment Company, Inc., et al., and the opinion of the court is reported in 155 Miss. 31, 119 So. 366. On the second appeal, under the same style, the opinion is reported in 161 Miss. 198, 132 So. 535, while the opinion of the court in overruling the suggestion of error therein is reported in 161 Miss. 222, 135 So. 497. The third appeal was in the particular branch of this cause which is now before the court, and the opinion on that appeal is reported in 160 Miss. 504, 135 So. 349. The questions raised by the present appeal are all settled by the prior decisions in this cause, which are the law of this case.

The decree of the court below was in accord with these prior decisions, and it will therefore be affirmed.

Affirmed.

[File endorsement omitted.]

[fols. 40-42] IN SUPREME COURT OF MISSISSIPPI

No. 30507

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

N. O. NELSON MFG. CO., Assignee

DECREE—May 1, 1933

This cause having been submitted at a former day of this term on the record herein from the Chancery Court of Adams County and this court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 8th day of August, 1932, be and the same is hereby affirmed. It is further ordered, adjudged and decreed that the appellee do have and recover of and from appellant, Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company, surety on the supersedeas appeal bond herein, the sum of $7,683.90 the amount of the decree in the court below together with the further sum of $384.19 being damages at the rate of 5 per centum as allowed by

statute, also interest on the amount of said decree from the date of its rendition in the court below until paid at the rate of 6 per centum per annum, and all of the costs of this court and in the court below to be taxed, etc.

[fol. 43] [File endorsement omitted]

IN SUPREME COURT OF MISSISSIPPI

No. 30507

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 1, 1933

Said Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company, in connection with their petition for the allowance of an appeal in said case present this their assignment of errors and say that the decision, judgment and decree of the Supreme Court of Mississippi, rendered in said case is erroneous and unjust to the appellants in the following respects:

1

That the Supreme Court of Mississippi erred in holding and deciding that the statute of Mississippi, approved March 28, 1918, known and designated as Chapter 128, Laws of Mississippi of 1918, (Hemingway's Code (1927) of Mississippi, Sections 2596 to 2603, both inclusive) upon which the decision against said Hartford Accident & Indemnity Company is based and upon which liability against it is predicated is not invalid as being repugnant to the Constitution of the United States, as being a law of said State which deprives persons upon whom it operates of liberty and property without due process of law.

2

That the Supreme Court of Mississippi erred in holding [fol. 44] and deciding that Section 3 of said Statute of the State of Mississippi, as construed and applied by the Supreme Court of Mississippi, in its decision and judgment in this suit, is not repugnant to the Fourteenth Amendment

to the Constitution of the United States, and, therefore, void in that it deprives the appellant of property and a property right without due process of law.

3

That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi, and particularly Section 3 thereof, is not repugnant to the Fourteenth Amendment to the Constitution of the United States as depriving the appellant, Hartford Accident & Indemnity Company and the landowner, Natchez Investment Company, Inc., of a property right, to-wit; the liberty of contract, without due process of law. To make this assignment of error more specific it is pointed out that the Supreme Court of Mississippi construed and applied said statute in this case, where the said appellant, as surety, entered into a bond with the said landowner, as obligee, providing that if said surety's principal, who was a contractor for the erection of a building for said landowner, 'shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract' the bond should be void and the bond further provided that it should not 'apply to nor cover guarantees * * * for the furnishing of any bond' under the contract between the 'landowner and the contractor', and the bond further provided that 'no right of action shall accrue upon or by reason hereof to or for the use and benefit of any one other than the obligee named therein,' by a holding that under said statute said bond was also subject to the additional obligation prescribed by said statute 'that such contractor shall promptly make payments to all persons furnishing labor or materials under said contract' and that the bond would [fol. 45] inure to the benefit of material men and that breaches of its conditions by the obligor would not be a defense by the surety against the claims of said material men. It is further pointed out that the Supreme Court of Mississippi thus construed and applied said statute with the effect of making it deprive said appellant and said landowner of the liberty of contracting for the indemnifying of said landowner against loss or damage directly caused by the failure of the contractor to perform the contract without also giving material men, furnishing materials to the contractor, a right of action in the bond for the value of

their materials furnished, despite the contractual provisions of the bond to the contrary.

4

Because the Supreme Court of Mississippi erred in affirming the judgment of the Chancellor sitting in the Chancery Court of Adams County, Mississippi, in overruling the demurrer of the Hartford Accident & Indemnity Company to the original bill in said cause; and particularly the second, fourth, fifth, sixth, eighth and ninth grounds of said demurrer which assert the repugnancy of said statute to the constitution of the United States.

5

Because the Supreme Court of Mississippi erred in affirming the judgment and decree of the Chancellor sitting in said suit in the Chancery Court of Adams County, Mississippi, and in rendering judgment and decree in favor of material men and against said appellant, Hartford Accident & Indemnity Company on said bond.

6

That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi [fol. 46] which, as construed by the Supreme Court of Mississippi, deprived the appellant, as surety on a bond, of the liberty of contracting that its liability as surety should extend only to the indemnification of the obligee (a landowner, having private work done for him), against loss or damage directly caused by the failure of the contractor faithfully to perform the contract and that no other person should have a right of action in the bond, is not void for its repugnance to the Fourteenth Amendment to the Constitution of the United States.

7

That the Supreme Court of Mississippi erred in holding and deciding that the Legislature of Mississippi had the power to enact said statute under the police power of said State.

8

That the Supreme Court of Mississippi erred in affirming the decree of the Chancery Court of Adams County, Mis-

sissippi, in favor of appellee because of the constitutional grounds set up in the other assignments of error.

W. Calvin Wells, L. Barrett Jones, Attorneys for Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company.

[fol. 47] [File endorsement omitted]

IN SUPREME COURT OF MISSISSIPPI

No. 30507

[Title omitted]

ORDER GRANTING APPEAL—Filed June 1, 1933

On this the 1st day of June, 1933, the Hartford Accident & Indemnity Company and the Ætna Casualty & Surety Company, having presented their petition for the allowance of an appeal in the suit in the Supreme Court of Mississippi, in which the Hartford Accident & Indemnity Company is the appellant, Ætna Casualty & Surety Company is its surety on said appeal, and the N. O. Nelson Manufacturing Company, Assignee, is the appellee, in which final judgment was, in said court, rendered against said appellant, Hartford Accident & Indemnity Company and said surety, Ætna Casualty & Surety Company, on May 1, 1933, in order to appeal said suit to the Supreme Court of the United States and to obtain a supersedeas of the final judgment or decree in said suit:

The petition is granted and the appeal is allowed and this shall operate as a supersedeas of the judgment or decree in said suit upon said Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company giving, within the time provided by law, a bond in the sum of Ten Thousand and No/100 Dollars, payable to the adverse par- [fols. 48–59] ties jointly and severally, conditioned that the said Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company shall prosecute their appeal to effect and answer all damages and costs if they fail to make good their plea.

Sydney Smith, Chief Justice of the Supreme Court of Mississippi.

[fol. 60] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF APPELLANTS IN COMPLIANCE WITH PARAGRAPH 9, RULE 13 OF THE COURT—Filed July 14, 1933

Now comes the Hartford Accident & Indemnity Company and the Ætna Casualty & Surety Company, Appellants in the above stylec cause and file their statement of points on which they intend to rely and the part of the record which they think necessary for the consideration thereof, to-wit:

1

The appellants rely on the point that the liberty of contract as to private business is a right protected by the Fourteenth Amendment to the Constitution of the United States and that a statute of the State which arbitrarily denies or materially abridges this right is unconstitutional and void and that Chapter 128 of the Laws of Mississippi of 1918, being Sections 2274 to 2881, both inclusive, Mississippi Code of 1930, the statute involved in this case, is condemned under this principle.

2

Appellants rely on the point that the third section of said Chapter 128 of the Laws of Mississippi of 1918, which [fol. 61] reads:

"When any contractor or subcontractor entering into any contract with any person, firm or corporation for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation, guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties may insert therein, such bond shall also be subject to the additional obligation that such contractor or sub-contractor shall promptly make payment to all persons furnishing labor or materials under said contract,"

is null and void as being in violation of the Fourteenth Amendment to the Constitution of the United States in that:

A. It denies to the appellants the liberty of contract.

B. In that it denies to appellants the equal protection of the law.

C. In that it denies to appellants the due process of law.

3

Appellants rely on the point that Section 3 of Chapter 128 of the Laws of Mississippi of 1918, as construed by the Supreme Court of the State of Mississippi in this case is violative of the Fourteenth Amendment to the Constitution of the United States by reason of said court construction, independently of the unconstitutionality of said section as written, in that said construction by said Supreme Court of Mississippi denies to appellants:

A. The liberty of contract.

B. The equal protection of law.

[fol. 62] C. The due process of law.

4

The point is made that the construction placed upon the bond written in this case by the Hartford Accident & Indemnity Company, said bond having been construed in the light of Section 3, Chapter 128 of the Laws of Mississippi of 1918, has the effect of depriving the appellant, Hartford Accident & Indemnity Company of:

A. The liberty of contract.

B. The equal protection of law.

C. The due process of law.

All in violation of the Fourteenth Amendment to the Constitution of the United States.

5

The point is relied on that it is not within the police power of the State of Mississippi to enact such a chapter as Chapter 128 of the Laws of Mississippi of 1918 and particularly Section 3 of said Act.

6

The point is relied on that it is not within the power of a legislature to make a contract between persons without

their consent or to give third persons rights in a contract without the consent of the contracting parties and that said legislative attempt, on the part of the State of Mississippi, through Section 3, Chapter 128 of the Laws of Mississippi of 1918 is for that reason violative of the Fourteenth Amendment to the Constitution of the United States.

Appellants designate as the parts of the record to be considered in connection with the above points the following:

[fol. 63] 1. The transcript of record in Cause No. 333, October Term 1931 of this Court, which by reference has been made a part of the transcript in this cause, with the exception of the following pages found in the above record, to-wit:

a. Pages 42 to 45, both inclusive.

b. The decree of the Chancery Court of Adams County, commencing at page 57 and ending on page 66, not here necessary.

c. The judgment of the Supreme Court of Mississippi, found at pages 74 to 83, both inclusive, and not here necessary.

d. Pages 91 to 104, not here necessary.

2. Appellants further designate as necessary to the consideration of this cause the answer of the Hartford Accident & Indemnity Company as set out at pages 58 to 61, both inclusive, of the transcript of this cause.

3. The answer of the Hartford Accident & Indemnity Company to the intervention of the N. O. Nelson Manufacturing Company, pages 62 to 64, both inclusive, of the transcript.

4. The agreed statement of facts, pages 65 to 75, both inclusive, of this transcript.

5. The decree of the Chancery Court of Adams County, Mississippi, pages 76 to 79 of this transcript.

6. The opinion of the Supreme Court of Mississippi in the instant case, page 80 of the transcript.

7. Decree of the Supreme Court of Mississippi, page 81 of this transcript.

8. Intervention, answer and cross bill of the appellee, pages 82 to 87, both inclusive, of this transcript.

9. The cross bill shown at pages 88 to 96 of this transcript.

[fols. 64 & 65] 10. The portion of the prayer of the cross bill shown at page 97 of this record.

Respectfully submitted.

W. Calvin Wells, L. Barrett Jones, Attorneys for Appellants.

I, Gerard H. Brandon, Attorney of record for appellee in the above case, do hereby acknowledge service upon me of a true copy of the above statement of points and designation of record filed on behalf of the appellants in the above styled cause.

Witness my signature, this the 11th day of July, 1933.

Gerard H. Brandon, Attorney for Appellee.

[fol. 66] [File endorsement omitted.]

[fol. 67] In Supreme Court of the United States

Designation by Appellee of Additional Parts of the Record for Consideration—Filed July 19, 1933

Now comes N. O. Nelson Mfg. Co., Appellee, in the above styled cause, and, in compliance with Paragraph 9, Rule 13, of this Court, designates additional portions of the Record which it thinks necessary for a consideration of the appeal and particularly for a consideration of the Appellee's Statement of Matters making against the Jurisdiction of this Court and for a consideration of its Motion to Dismiss or Affirm and Brief in support thereof, and said Appellee designates the following additional portions of the Record, to-wit:

Appellee designates as a part of the Record to be considered in connection with this appeal and its said Motion:

1. The entire transcript of Record in Cause No. 333, October Term, 1931, of this Court, which by Præcipe of the Appellant has been made a part of the transcript in this cause, it being unnecessary because of agreement of the parties hereto to reprint any portion of said Record.

2. The Opinion, Judgment, and Mandate of the Supreme Court of the United States rendered in Cause No. 333, October Term, 1931, same being a portion of the Record in said

Case No. 333, October Term, 1931, and therefore by agreement of parties not necessary to be reprinted.

Respectfully submitted.

Gerard Brandon, O. I. O., Gerard H. Brandon.

Service of the foregoing Designation of Additional Portions of the Record is hereby acknowledged this July 15th 1933.

W. Calvin Wells, L. Barrett Jones, Counsel for Appellants.

[fol. 68] [File endorsement omitted.]

Endorsed on cover: File No. 37,842. Mississippi Supreme Court. Term No. 239. Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company, appellants, vs. N. O. Nelson Manufacturing Company, assignee. Filed July 3, 1933. File No. 239, O. T. 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 239

HARTFORD ACCIDENT AND INDEMNITY COMPANY AND ÆTNA CASUALTY & SURETY COMPANY, APPELLANTS,

vs.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT AS TO JURISDICTION.

In pursuance of paragraph 1 of Rule 12 of the Supreme Court, the appellants, Hartford Accident & Indemnity Company and Aetna Casualty & Surety Company, herewith file with the Clerk of the Supreme Court of the United States the statement of points on which they intend to rely and of the parts of the record which they think necessary for the consideration thereof, to wit:

The jurisdiction of this case arises under the Fourteenth Amendment to the Constitution of the United States.

The appellants rely on the point that the liberty of contracting as to private business is a right protected by the

14th Amendment of the Constitution of the United States; that a statute of a state which arbitrarily denies or materially abridges this right is therefore unconstitutional and void, and, specifically, that the statute of the State of Mississippi, designated as chapter 128 of the Laws of Mississippi of 1918 (Hemingway's Code of Mississippi, 1927, Sections 2596 to 2603, inclusive), Sections 2274 to 2881, both inclusive, of the Mississippi Code of 1930, is for these reasons unconstitutional.

The particular portion of the statute to which the objection of unconstitutionality especially relates, in this case, is the 3d section, which provides that "When any contractor or subcontractor entering into any contract with any person, firm or corporation for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation, guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties may insert therein, such bond shall also be subject to the additional obligation that such contractor or subcontractor shall promptly make payment to all persons furnishing labor or materials under said contract," and that, though the bond omit this additional obligation, persons furnishing labor and material shall have a right of action on the bond to the same extent as if it were contained in the bond.

The point most seriously relied on arises under the 3d section of the Act, and under the construction given to that section by the Supreme Court of Mississippi in the present case. The bond which the landowner and the appellant, Hartford Accident & Indemnity Company, which is a surety company, agreed on in this case was carefully drawn to prevent its falling within the purview of the Act. Its condition was not "for the faithful performance of the contract," but to "indemnify the obligee against loss or damage directly caused by the failure of the principal to perform the contract." A condition of it was that breaches

of the contract by the obligee would avoid the bond. It provided against assignment of the funds due the contractor, and that on notice of any lien in favor of a materialman the funds due the contractor should be withheld by the obligee until the lien was discharged. It was provided that the bond was not to cover any provision of the contract "for the furnishing of any bond," and that no suit should be maintained on the bond by or for the use of any one except the obligee.

The point is relied on that the Supreme Court of Mississippi, in deciding that such a bond fell within the purview of the statute, that the provisions of the bond by which it was sought to deny to materialmen a right of action on it were ineffectual, and that the provisions which made the bond void if the underlying contract was breached could not be used in defense against the liability arising under the statute in favor of materialmen, thereby, for the purposes of appeal to this Court, enlarged the scope of the language of the Act itself, and that its constitutionality will be tested in this Court according to the effect produced by the construction of the Supreme Court of Mississippi.

The point is, therefore, relied on that the statute deprives a landowner, contracting to have work done of a purely private nature and affected with no public use or interest, and a company engaged in the surety business of the liberty of contracting for the indemnifying of the landowner against loss directly arising from breaches of the contract by the contractor except upon the condition that the surety shall unconditionally become liable for all claims of materialmen, and that, as thus construed and applied, the statute is an arbitrary and unconstitutional interference with private liberties and property rights.

The point is relied on that the statute, as construed and applied by the Supreme Court of Mississippi, cannot be upheld, as against the constitutional objection, on the ground that its enactment is within the police power of the State.

The point is relied on that the Supreme Court of Mississippi erred in affirming the judgment of the Chancellor sitting in the Chancery Court of Adams County, Mississippi, in overruling the demurrer of the Hartford Accident & Indemnity Company to the bill of complaint, so far as relates to grounds 3, 4, 5, 6, 7, 8, 9, and 10 of the demurrer, which attach the statute stated above for repugnancy to the United States Constitution (*a*) because of its unwarranted interference with the freedom of contract of the owner of the property, the contractor and the surety of the contractor, (*b*) because it is a legislative attempt to make a contract between persons without their consent and to give to third persons rights in a contract without the consent of the contracting parties, and thereby deprives the appellant of liberty and property without due process of law and denies it the equal protection of the law.

The Supreme Court of Mississippi ruled that nowithstanding the provisions of a private contract it was within the powers of the legislature to set aside the provisions of that contract and to make the contract, a surety bond in this case, inure to the benefit of persons not a party thereto and against whose right to sue thereon the contract has specifically provided against.

The court held that the provisions of the contract must yield to the statute and that third persons, not parties to the contract, had a right to recover thereunder because of the statute.

The appellants, in filing their præcipe for transcript, have included therein only such parts of the record as are, in the judgment of their counsel, necessary to the consideration of the points set forth above. Hence the appellant designates as necessary to the consideration of these points the entire record as transmitted to this court.

Appellants cite as sustaining the jurisdiction of this case the following cases:

Adkins v. *Children's Hospital*, 261 U. S. 525; 67 L. Ed. 785.

Appleby v. *New York*, 271 U. S. 364; 70 L. Ed. 992.

Brinkerhoff-Faris Trust Co. v. *Hill*, 281 U. S. 673; 74 L. Ed. 1107.

Cheney v. *Libby*, 134 U. S. 68; 33 L. Ed. 818.

Coolidge v. *Long*, 282 U. S. 582; 75 L. Ed. 562.

Coppage v. *Kansas*, 236 U. S. 1; 59 L. Ed. 441.

Fiske v. *Kansas*, 274 U. S. 380; 71 L. Ed. 1108.

Gibbs v. *Tally*, 133 Cal. 373; 65 Pac. 970.

Hess v. *Denham Lumber Co.* (Texas), 218 S. W. 162.

Kelly v. *Johnson*, 251 Ill. 135; 95 N. E. 1068; 36 L. R. A. (N. S.) 573.

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William v. *Baldwin* (*Tex.*) 228 S. W. 554.

Woolf v. *Industrial Court*, 262 U. S. 522; 67 L. Ed. 1103.

The attention of appellee is directed to paragraph 3, Rule 12, of the Supreme Court of the United States, which reads:

> "Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in rule 7, paragraph 3 (former rule 6)."

W. CALVIN WELLS,
L. BARRETT JONES,
Attorneys for Appellants, Hartford Accident & Indemnity Co. Aetna Casualty & Surety Company.

I, Gerard H. Brandon, attorney of record for appellee, N. O. Nelson Manufacturing Company, assignee, do hereby acknowledge service upon me of the copy of the foregoing jurisdictional statement, but reserve the right of the appellee to move to dismiss.

Witness my signature this the 12th day of June, 1933.

GERARD H. BRANDON,
Attorney for Appellee, N. O. Nelson Manufacturing Company, Assignee.

Address: Natchez, Mississippi.

FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 239.

HARTFORD ACCIDENT & INDEMNITY COMPANY AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS,

VS.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

BRIEF FOR APPELLANTS.

L. BARRETT JONES,
W. CALVIN WELLS,
Attorneys for Appellants.

Of Counsel for Appellants.

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Supreme Court of the United States

OCTOBER TERM, 1923.

No. 239.

HARTFORD ACCIDENT & INDEMNITY COMPANY AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS,

VS.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

BRIEF FOR APPELLANTS.

The first opinion of the court below is found in 155 Miss. 31 (119 So. 366). Subsequent opinions are found in 132 So. 535, 161 Miss. 198; 135 So. 497, 161 Miss. 222; 160 Miss. 504, 135 So. 349, and 147 So. 815, not officially reported.

STATEMENT OF THE CASE.

In the statement of this case, where the record is referred to, unless otherwise shown, the references are to record No. 333, October Term, 1931, which record is a part of the record in this cause.

After the main cause had been heard by the trial court and while that court had it under advisement the present appellee filed its petition of intervention and the appellant demurred thereto and upon the overruling thereof appealed to the Supreme Court of Mississippi, where the cause was affirmed and remanded. See 166 Miss. 222, 135 So. 497.

Thereafter, the appellant answered the intervention of appellee, adopting as its answer to the intervention its answer filed in the main cause to the original bill and to the original intervention. See record in cause No. 239, pages 16-17.

So much of the answer filed by the appellant to the original bill as is germane to the constitutional questions herein involved is found in the record of cause No. 239, pages 13-16.

The case involves solely the constitutionality of a statute of Mississippi (Chapter 128, Laws of 1918, State of Mississippi; Hemingway's Code, Sec. 2598, and Sections 2274-81, inclusive, Mississippi Code of 1930).

A full copy of the statute is set out in an appendix hereto.

Briefly, the parts of the statute material here may be summarized as follows:

Section 1 gives to materialmen (and as used herein the word "materialmen" will include subcontractors and laborers, as well as materialmen in the strict sense), who have not been paid by a contractor engaged in private construction, the right to give the landowner notice of their claims and thereby bind the funds due by the landowner to the contractor, and create a lien in their favor accordingly.

Section 2 prohibits a contractor from assigning the contract or the proceeds thereof, with a proviso that this section shall not apply if the bond provided for in Section 3 be given.

Section 3 (the section which is the subject of the constitutional attack herein) provides:

> "That when any contractor or subcontractor, entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under

said contract, the same as if such stipulation had been incorporated in said bond; and any such person who has furnished labor or materials used therein for which payment has not been made, shall have the right to intervene and be made a party to any action instituted on such bond, and to have his rights adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the rights or claims for damages or otherwise, of the obligee:"

The Natchez Investment Company filed suit (R. 1) in one of the chancery courts of Mississippi against J. V. & R. T. Burkes as contractors, the appellant, Hartford Accident & Indemnity Company as surety on the contractor's bond, and a number of materialmen, alleged to have claims against the complainant under the statute above referred to, and the New Orleans Bank and Trust Company, to whom it is alleged the contractors had assigned a part of the purchase price. The complaint set out that the complainant had contracted with the contractors for the erection of a hotel—the contract being attached as an exhibit and made a part of the complaint (R. 10-17); that the contractors gave the complainant a bond with the present appellant as surety thereon—a copy of the bond being also attached as an exhibit and made a part of the complaint (R. 17-20); that it had received notice from various other defendants that they had furnished materials in the construction of the hotel and had not been paid by the contractors; that they had been notified by the New Orleans bank that the contractors had assigned to it a large portion of the contract price and that unless the bond

exhibited as a part of the complaint be held to be such a bond as to satisfy the requirements of the statute above referred to, the assignment to the bank was void.

The complainant prayed that the bond be held to be such a bond as is provided for in the statute aforesaid; that the validity of the assignment to the New Orleans bank be determined; that materialmen claiming liens should be required to assert them in the action and for the adjustment of all equities between the parties (R. 9).

The present appellant, the surety on the bond, filed its demurrer (R. 39) making the points:

(1) That the bond showed on its face that it was not such a bond as the statute contemplates.

(2) And that it did not guarantee faithful performance of the contract within the meaning of the statute.

(3) That if the bond should be construed as coming within the terms of the statute, then that law itself is void as an unwarranted interference with the freedom of contract as against the landowner, the contractor and the contractor's surety, and, therefore, violates the "due-process-of-law clause" of the 14th Amendment of the Constitution of the United States.

(4) That the statute further violates the same provision of the Constitution in so far as it prohibits assignment of the purchase price by the contractor, in that it is an unwarranted interference with the freedom of contract.

(5) That it is not within the power of the Legislature of Mississippi to create a contract between persons *sui juris.*

(6) And that so to construe the law would constitute the taking of property without due process of law in violation of said clause of the Constitution.

(7) That the section of the law (Sec. 3) which requires that the contractor's bond when given at the instance of the owner shall protect third persons not named in the bond is unconstitutional and void in that it is an attempt by the legislature to

(a) make a contract between persons without their consent;

(b) give a class of third persons rights without the consent of the parties to the contract, and thereby constituting an absolute infringement of the freedom of contract.

(8) And therefore said statute violates the aforesaid provision of the Constitution.

(9) And that it is not within the police power of said state to pass such an act.

The demurrer was overruled and appeal taken to the Supreme Court of Mississippi (R. 41).

The Supreme Court on this interlocutory appeal held (R. 46; R. 54) that while the state has no such power to deal with the contracts of private persons as it has to deal with the contracts of public bodies, still it did have some power of regulation and that the statute did not go beyond constitutional limits in this respect.

In emphasizing the point that the parties had freedom of contract even as to the nature of the bond itself, the court in its official opinion (155 Miss. 31, 119 So. 366) in quoting, in this context, the part of Section 3 of the statute which refers to the nature of the statutory bond, italicizes the portion as to its "containing such provisions and penalties as the parties thereto may assert therein"—though in printing this opinion in the transcript in this case (R. 55) the italics are not shown.

The court then held that the bond in the record was such a bond as came within the provisions of the statute.

The case having been remanded for further trial (R. 57), a decree was had in the chancery court (R. 57) finding against any right of the original complainant to recover, but awarding judgments against the present appellant in favor of the various materialmen; and the surety company again appealed.

The further proceedings in the case after the decision by the Supreme Court of Mississippi that the statute was not violative of the United States Constitution are not material to a decision of the questions presented in the appeal; except in so far as they show a final judgment against the appellant and except in so far as the subsequent decisions by the Supreme Court in the case disclose the construction, range and effect which that court, as the highest court of the state, gives to the statute; but are material for these purposes.

So far as the first opinion discloses, it was left open to the appellant to enforce the provisions in the bond and to rely upon the breach of conditions therein as a

defense against liability, except the provision that no right of action on the bond should accrue for the benefit of anyone other than the obligee named therein. The judgment overruling the demurrer of legal necessity negatived the right to enforce this term of the contract. From the opinion in the second appeal (R. 67) it appears that the bond had been so breached by the obligee in various respects as to render it void, under its written terms and conditions; but the court held (R. 72) that when the bond was given the statute wrote into it the statutory obligation in favor of materialmen and that none of the provisions of the bond in conflict therewith could be given effect (R. bottom p. 72).

Final judgment and decree of the Supreme Court of Mississippi was rendered in accordance with the opinion just stated (R. 74).

The present appellants filed what is called, in the Mississippi practice, a suggestion of error.

In this suggestion of error (R. 83) the federal constitutional questions were again presented in view of the broader construction given to the statute by the court in its second opinion. The suggestion of error was entertained by the court; and, after a discussion of the constitutional questions, was overruled (R. 90). In connection with the overruling of the suggestion of error, the court rendered its third opinion (R. 86), reiterating (R. 88) its prior holding that "while parties have a constitutional right to make private contracts, and to embody in them such stipulations as they desire, yet the legislature may provide rights, under law, for material-

men and laborers which private contracts cannot displace."

On the present branch of the case there are two reported opinions, one in 160 Miss. 504, 135 So. 349, holding that the appellee has not intervened too late and was not cut off from intervening by the original hearing and decree on the main case, and the other, from which this appeal is taken, not officially reported, is found in 147 So. 815, and that decision reaffirms the holding of the Supreme Court of Mississippi in its prior decisions found in 155 Miss. 31, 161 Miss. 198 and 161 Miss. 222.

Following the affirmance of this case by the Supreme Court of Mississippi, 147 So. 815, this appeal was perfected.

SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

1. That the Supreme Court of Mississippi erred in holding and deciding that the statute of Mississippi, approved March 28, 1918, known and designated as Chapter 128, Laws of Mississippi of 1918 (Hemingway's Code (1927) of Mississippi, Sections 2596 to 2603, both inclusive) upon which the decision against said Hartford Accident & Indemnity Company is based and upon which liability against it is predicated, is not invalid as being repugnant to the Constitution of the United States, as being a law of said state which deprives persons upon whom it operates of liberty and property without due process of law.

2. That the Supreme Court of Mississippi erred in holding (fol. 44) and deciding that Section 3 of said statute of the State of Mississippi, as construed and applied by the Supreme Court of Mississippi, in its decision and judgment in this suit, is not repugnant to the Fourteenth Amendment to the Constitution of the United States, and, therefore, void in that it deprives the appellant of property and a property right without due process of law.

3. That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi, and particularly Section 3 thereof, is not repugnant to the Fourteenth Amendment to the Constitution of the United States as depriving the appellant, Hartford Accident & Indemnity Company and the landowner, Natchez Investment Company, Inc., of a property right, to-wit; the liberty of contract, without due process of law. To make this assignment of error more specific it is pointed out that the Supreme Court of Mississippi construed and applied said statute in this case, where the said appellant, as surety, entered into a bond with the said landowner, as obligee, providing that if said surety's principal, who was a contractor for the erection of a building for said landowner, "shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract" the bond should be void and the bond further provided that it should not "apply to nor cover guarantees * * * for the furnishing of any bond" under the contract between the "landowner and the contractor," and the bond further

provided that "no right of action shall accrue upon or by reason hereof to or for the use and benefit of anyone other than the obligee named therein," by a holding that under said statute said bond was also subject to the additional obligation prescribed by said statute "that such contractor shall promptly make payments to all persons furnishing labor or materials under said contract" and that the bond would (fol. 45) inure to the benefit of materialmen and that breaches of its conditions by the obligor would not be a defense by the surety against the claims of said materialmen. It is further pointed out that the Supreme Court of Mississippi thus construed and applied said statute with the effect of making it deprive said appellant and said landowner of the liberty of contracting for the indemnifying of said landowner against loss or damage directly caused by the failure of the contractor to perform the contract without also giving materialmen, furnishing materials to the contractor, a right of action in the bond for the value of their materials furnished, despite the contractual provisions of the bond to the contrary.

4. Because the Supreme Court of Mississippi erred in affirming the judgment of the chancellor sitting in the Chancery Court of Adams County, Mississippi, in overruling the demurrer of the Hartford Accident & Indemnity Company to the original bill in said cause; and particularly the second, fourth, fifth, sixth, eighth and ninth grounds of said demurrer which assert the repugnancy of said statute to the Constitution of the United States:

5. Because the Supreme Court of Mississippi erred in affirming the judgment and decree of the Chancellor sitting in said suit in the Chancery Court of Adams County, Mississippi, and in rendering judgment and decree in favor of materialmen and against said appellant, Hartford Accident & Indemnity Company, on said bond.

6. That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi (fol. 46) which, as construed by the Supreme Court of Mississippi, deprived the appellant, as surety on a bond, of the liberty of contracting that its liability as surety should extend only to the indemnification of the obligee (a landowner, having private work done for him), against loss or damage directly caused by the failure of the contractor faithfully to perform the contract and that no other person should have a right of action in the bond, is not void for its repugnance to the Fourteenth Amendment to the Constitution of the United States.

7. That the Supreme Court of Mississippi erred in holding and deciding that the Legislature of Mississippi had the power to enact said statute under the police power of said state.

8. That the Supreme Court of Mississippi erred in affirming the decree of the Chancery Court of Adams County, Mississippi, in favor of appellee because of the constitutional grounds set up in the other assignments of error.

ARGUMENT.

Summary.

1. This court will determine the constitutionality of the statute not on its literal words alone, but upon the construction and effect given it by the highest court of the State of Mississippi. The statute attacked is unconstitutional on its face; but especially so under the construction given it by the state court.

2. The decisions of the Supreme Court of Mississippi in this case, construing the statute, will themselves be construed together and will be interpreted in the light of the facts to which the language of the opinions relate.

3. It was necessary for the court to construe the statute to determine whether the bond in the case was such a bond as fell within the purview of the statute.

4. The bond did not purport to follow the statute by "guaranteeing the faithful performance of the contract," but only to give to the obligee a modicum of indemnity against direct loss and damage and to give this only on certain express conditions or contingencies; and the bond expressly provided that no right of action should accrue on it to or for the benefit of anyone other than the named obligee.

5. The Supreme Court of Mississippi, in its first opinion, construed the statute as extending to such a bond.

6. On the second appeal, the court held that despite the fact that the parties were at liberty to insert in the bond such provisions and conditions as they saw fit, the statute prevented any force or effect being given to any such provisions or conditions in so far as they defeat the right of materialmen to have a full, unconditional right of action on the bond, and reaffirmed that on the suggestion of error and on the direct appeal on this branch of the case.

7. The effect of the four decisions is that the statute under attack has the effect of preventing a landowner and a surety company from contracting for the conditional indemnification of the landowner against direct loss and damage under a building contract unless the parties are also willing to agree that third persons (the materialmen) may also have an unconditional right of action on the bond for debts due them by the contractor; even though the parties expressly agree as one of the conditions on which the surety assumes liability, that such third persons shall have no rights under the contract.

8. As thus construed, the statute abridges the liberty of the landowner of contracting for his own personal indemnification in a purely private matter; and abridges the liberty of the surety of contracting to give that indemnification on terms mutually satisfactory to the surety and the landowner.

9. It gives to third persons contractual rights, superior to those of the parties themselves, in a purely private contract, without the assent or consent of the

parties thereto and against the express terms of the contract as consented to by the original parties.

10. The case involves no question as to how far a state may regulate the business of corporate suretyship.

11. The validity of the statute in so far as it merely creates a lien in favor of materialmen is not involved in the case.

12. The right to contract as to one's own affairs is the part of the liberty protected by the due-process-of-law clause of the Constitution; and statutes materially and arbitrarily affecting this liberty are void.

13. The jurisdiction of this court over the constitutional questions is complete, since the action was based on the statute attacked and the constitutionality of the statute was raised by demurrer. In such cases this court will put its own interpretation on the bond and the bill of complaint; and is bound by the decisions of the state court only as to the construction it has put on the statute in applying it to the admitted facts presented.

It is axiomatic that this court, in determining the constitutionality of a state statute, will not look alone to the words of the statute, but will narrow or broaden its meaning and practical effect accordingly as the highest court of the state has construed it and applied it. If the attack be made for violation of the due-process-of-law clause of the Constitution, this court will uphold the stat-

ute, even though on its face it appears to violate the constitutional provision, if the state court has so construed it and applied it as to eliminate the offending features of it. On the other hand, though the statute be fair on its face, or if it be so worded as that it might be construed and applied either in a constitutional way or in an unconstitutional way, and the highest court of the state, having the statute before it for construction and application, construes it and applies it in such a way as to introduce into it an element, which would make it, as thus construed and applied, deprive any person of life, liberty or property without due process of law, this court must invalidate it, even though as an original proposition, this court would not give it any such construction or effect.

Supreme Lodge v. *Meyer*, 265 U. S. 30, 68 L. ed. 885.

Near v. *Minnesota*, 283 U. S. 697, 75 L. ed. 1357.

Even on its face the statute appears to be unconstitutional. For the legislature to say that, if a contractor, making a contract with a private person, for work of a nonpublic nature, enters into a bond with such person guaranteeing the performance of his contract, he must insert into the bond an obligation in favor of third persons, even though such third persons be his prospective creditors, or the law will insert the additional obligation, seems to be an unconstitutional interference with the liberty of contract. However, the construction given by the state court to the statute makes it go so much further in this direction that this phase of the case may be left with the mere mention of it.

The decisions of the Supreme Court of Mississippi, in so far as they construe and apply the statute in question, must themselves be construed and interpreted in connection with the factual elements to which the language used in them applies. In simpler words, we mean to say that to understand the meaning and effect of these decisions, we must read them in connection with the facts (including the bond itself, as one of the facts) with which they were dealing, and in connection with the questions presented by the record before the court at the time of the various decisions.

Furthermore, we think we are reasoning soundly when we assert that, while it is in the last two decisions that the court most clearly gives to the statute the interpretation and effect which, from our point of view, renders it repugnant to the Constitution, still it is by the construction given to the statute by the Mississippi court in these last decisions, as well as in the first one, that this court will determine its scope and constitutional validity, even in passing on assignments of error relating to rulings on the demurrer which raised the questions of its constitutionality and which was the subject of the first appeal, and, therefore, of the first decision. In passing, however, we may note that these constitutional questions were again presented to the court by the suggestion of error which the court entertained, discussed and overruled; and this we understand is sufficient of itself to give this court jurisdiction over these questions as applied to the whole case.

Mallet v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015.

Leigh v. *Green,* 193 U. S. 79, 48 L. ed. 623.
Brinkerhoff-Faris Trust Co. v. *Hill,* 281 U. S. 673, 74 L. ed. 1107.

It is only fair to the Mississippi court to read all four of the opinions together, as if they were a single opinion, especially since in the last opinion that court so declares (R. middle of p. 88).

So let us look at the decisions in this light.

Reading the bond in this case and reading the statutes, it is perfectly plain that the landowner and the surety company undertook to make a special contract for the indemnification of the landowner in such a way as to give the landowner a modicum of protection, on certain clearly-expressed terms and conditions, and in such a way as not to subject the surety to the enlarged liability imposed by the statute.

For example, the statute speaks of a bond "guaranteeing the faithful performance of such contract." The condition of the bond in the record (R. 18) is that "the principal shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract"—two very different things both in law and in fact; and even this indemnity was itself not absolute, but was conditioned upon certain clearly-defined contingencies.

We shall not overlook the fact that the Supreme Court of Mississippi, in its opinion (R. 56, R. 87), laid great stress upon the fact that the bond on its face recites that "whereas the principal and the obligee have entered into a certain written contract to construct Eola

Hotel building * * * a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof"; and that in the contract thus referred to there is a provision (Article 30, R. 16) that it shall be the obligation of the contractor to include within his bill the furnishing of a bond conditioned as the law of Mississippi requires and that this bond shall protect the owner against all liens or claims against the building according to the laws of the State of Mississippi; and another provision (R. 17) that the contractor's bondsmen shall obligate themselves to all the terms and covenants of specifications and of the contracts covering the work; though in another portion of the contract, to which the Supreme Court of Mississippi made no reference (R. 15), the landowner reserved the right to vary the form of this bond. Reading the bond and the contract together, it is most manifest that the parties were studiously attempting to draw a special contract which would not impose on the surety the liability imposed in Section 3 of the statute.

As later shown in this brief, this court will construe the contract for itself, and is not bound by the construction of the state court.

However, no matter how fully we may consider these provisions and every other provision of the contract between the contractor and the landowner as being incorporated into the bond in the part of it where the reference to this contract is made, nevertheless, there is no escape from the fact that the written contract between the landowner and the surety, as expressed in the bond, did not stop at this point; for the language referring to

the contract between the contractor and the surety is immediately followed by stating the conditions which attach to the obligations of the bond (not merely the obligation to pay the penal sum of the bond, $316,812, but also such obligation as the surety may have assumed by the reference to the underlying contract) and on the happening of which the bond should be void (R. 18).

In addition to the main condition that the bond should be void if the principal should indemnify the owner against loss or damage directly caused by the failure of the principal faithfully to perform his contract, certain other express conditions precedent to liability on the part of the surety were inserted. Among these conditions were:

(a) that the obligee should at all times and in the manner specified in the contract comply with his obligations assumed under the contract (R. 18);

(b) that notice should be immediately given the surety of any default on the contractor's part, with right on the surety's part to take over the contract and complete it (R. 18);

(c) that if there came to the notice or knowledge of the obligee that there was any claim against the contractor for unpaid labor or material, the obligee should not make any further payments to the contractor until such claims were satisfied (R. 19);

(d) that the bond should not cover any guarantee in the contract "for the furnishing of any bond" (R. 19, bottom page). (It may be seen that if the reference

earlier made in the bond to the underlying contract had the *prima facie* effect of writing into the bond the provision as to giving any bond, this express condition had the effect of excluding it); and

(e) that payments to the contractor should be made in cash only (R. 20, Para. 7, of the conditions);

(f) that "no right of action shall accrue upon or by reason hereof, to or for the benefit of anyone other than the obligee named herein" (R. 20).

The contract itself provided (R. 16) against assignments of the contract price without the owner's consent.

With this bond before it, and with the statute before it, the Supreme Court of Mississippi in its opinion (R. 55, near bottom of page) asks this question: "Does the bond given in the present case come within the provisions of Section 3; in other words, is it such a bond as is provided for herein?"

This made it necessary for the court to construe and apply the statute. If it answered the question in the negative, the surety's demurrer was well taken; and the New Orleans bank's assignment of the contract money was invalid, under Section 2 of the Act. If it answered the question in the affirmative, it exposed the statute to the constitutional attack also made in the demurrer; but left the bank's assignment of the funds valid. The court had already quoted and underscored the portions of Section 3 of the statute, that the prescribed bond could contain "such provisions and penalties as the parties thereto may assert therein." It thereupon held that the bond in the record was such a bond as the statute con-

templated and that the bank's assignment of the funds was good.

The effect of this decision was to construe the statute as not requiring an unconditional bond and as including within its purview a bond such as the one before it, even though one of the conditions in it was that no right of action on it should accrue in favor of or for the use of any materialmen, and though there were other provisions in it which rendered liability on it wholly conditional. It might have been more logical for the court to construe the statute as requiring an unconditional bond; but the court did not so construe it.

The state court in its first opinion (R. 54, 55) seems to assume that the constitutional objections to the statute are answered by the holding that the landowner has free choice between giving the bond and allowing the funds in his hands to become subject to the statutory lien—that the statute did not compel the landowner to take any bond at all. This construction of the statute (that Section 3 of the Act in so far as it provides for the taking of a bond is not mandatory on the landowner) would have had the effect of avoiding the point that it would be violative of the Constitution to require mandatorily that a landowner give a bond to protect materialmen, if any such point had been made. But that is not the point at all.

The constitutional point raised in the record on both the appeals is that while the landowner has the choice under the statute of taking no bond (though a failure to do so impounds the funds in his hands to the extent stated in the statute) or of taking a bond which will

give a right of action also to the materialmen, the statute denies him the liberty of taking a bond for his own immediate protection (though he is willing to have the funds impounded, if occasion therefor should arise) unless he also takes a bond for the benefit of the materialmen; also, that it denies a surety, who, as in the case at bar, is willing to indemnify a landowner against direct loss or damage from the contractor's failure to perform the contract, but is unwilling to assume any obligations to materialmen, from so contracting with his obligee as to escape this added liability and increase of risk.

Nor can the questions involved be fully grasped unless we keep in mind that, under the statute, in the absence of a bond, the rights of materialmen are limited to that portion of the contract price which is unpaid at the time notice is given of their claims, but that, if a bond be given, the liability to materialmen is not limited even to the total contract price, but only by the amount of the claims themselves, whatever that amount may be.

The point was squarely made that if the statute were so construed as to include within its purview—and especially within the purview of that portion of Section 3 which provides that though the parties omit from the bond the additional obligation in favor of the materialmen, the bond shall nevertheless inure to their benefit "the same as if such stipulations had been incorporated in said bond," and gives the materialmen a corresponding right of action on the bond—a bond, such as the one in the case at bar, wherein the additional obligation was not only omitted, but wherein there was an

express condition that it should not inure to the benefit of materialmen, the statute was unconstitutional for its abridgement of the liberty of contract.

Without discussion, the court, in its first opinion, merely decided against the constitutional attack on this ground, by an affirmance of the chancellor's decree overruling the demurrer which presented this question.

How far the court had gone in construing this provision of the statute as to the additional obligation of materialmen did not definitely appear until the court had the case before it on the second appeal. The facts then presented made it necessary to give further construction to this provision of the statute. The bond was plainly conditional on its face. Even if the parties had written into it the obligation in favor of the materialmen, in the same place in the bond and in the same context as the obligation in favor of the landowner was written, still both of these obligations would have been followed by the express conditions which were in terms made conditions precedent to any liability under the bond. As shown in the statement of facts prefacing the second opinion (R. 67-70), the conditions on which the surety was to be held liable were broken in a number of respects (though for present purposes it is sufficient to state only one—that the owner paid the contractor in notes instead of cash; a violation of the seventh condition of the bond) (R. 20). No recovery could be had on the bond unless the court held that these conditions could be read out of it as the result of legislative fiat.

The court then held (R. 72) that the statute prohibited the parties to the bond from entering into any

stipulation which would affect the statutory obligation. Or as the court put it, in passing on the suggestion of error, with reargument of the constitutional questions (R. 84-86): "While the parties have a constitutional right to make private contracts and to embody in them such stipulations as they desire, yet the legislature may provide rights, under law, for materialmen and laborers which private contracts cannot displace."

Here we have a construction of the statute which squarely presents one of the constitutional questions we are making. For the two decisions taken together mean and must mean that while the parties to the contract are allowed perfect freedom as to what they will agree on and insert into the contract between them, as expressed in the bond, the statute nevertheless prohibits the giving of any effect to such provisions.

It seems to us idle to speak of "freedom of contracting," when the only freedom is to allow the parties to agree on contractual relationships as a mere matter of writing them down, with the statute nullifying the effect of them as soon as they are written down.

When the three decisions are construed together, we have before us the plain, simple holding of the Supreme Court of Mississippi, that the statute under attack in this case is to be construed as preventing a landowner and a surety from contracting for the conditional indemnification of the landowner against direct loss under a binding contract unless the parties also are willing to agree that the surety on this conditional bond by which this modicum of indemnity is secured shall also be liable to certain third persons (the material-

men) whose right of action on it shall be absolute and not subject to the conditions the parties have agreed on. The statute is also construed as prohibiting the surety from contracting to indemnify the landowner only; even though in express terms, and as a part of the very contract by which the surety's liability is assumed and is to be measured, it is expressly provided that it shall not inure to the benefit of any one except the landowner.

The practical effect of such a construction of the statute is well illustrated by the ruthless disregard of private rights which the facts of this case present. What is called the bond in this case is in form a bond, but it is more than that; it is a special contract. There is a manifest practical difference, to landowner, to contractor and to surety, between a special contract (though in form of a bond) which merely conditionally indemnifies the landowner against direct loss and a bond which also unconditionally assumes liabilities to materialmen—unknown and undisclosed at the time the contract of suretyship is entered into, and unlimited in amount. The premium to be paid by the landowner and the risk of the surety are wholly different. The number of contractors who can give bonds in large sums for the protection of materialmen is comparatively small; since the chief element here to be considered is financial responsibility. The number of contractors who can give bond only for the owner's protection against failure to complete the contract is much larger; for here the contractor's personal skill and his reputation for honesty are more controlling; especially where the surety on the bond reserves the right to complete, if the contractor fails; and pay-

ments are to be withheld except as the work progresses. Hence, when the owner requires only the latter form of bond, the number of contractors who can bid is materially increased, and the landowner gets the benefit of the competition and a lessening of the contract price.

Under the bond, as written in this case, the surety's risk was comparatively small, until it was extended by statutory fiat; and yet a comprehensive plan for the protection of all parties was specially agreed on in the terms set out in it. If the landowner paid the contractor only as the work progressed, and paid only in cash so that the contractor would be able to pay his bills for labor and materials promptly; and if, on notice of any such unpaid claim as would create a lien against the landowner or his property, the landowner should hold up the balance of the contract price; and if, as provided in the contract, the contract price could not be assigned, and the surety had the right to come in and complete the work, upon failure of the contractor, with right to receive the balance of the contract price so far as necessary to reimburse itself—if this plan set out in the bond and contract had been pursued, the surety's risk was small. Nor would any rights of materialmen, under Section 1 of the statute in question, have been prejudiced, for their lien on the funds extends only to the balance due the contractor at the time the notice is given the landowner; and the bond provides that the landowner, upon receipt of such notice, should hold up the balance due the contractor.

And yet the surety in this case, which was careful to limit its liability to the risk just indicated, is, as a

result of the construction and application of the statute, confronted with an adjudged liability of some $75,000; notwithstanding the landowner with whom the surety contracted began almost as soon as the bond was signed to violate its provisions, to make payment in its notes instead of cash, to consent to assignments of the contract price, to fail to hold up the contractor's money after notice of claims, etc.

Also upon the authority of the statute attacked, the Supreme Court of Mississippi has held this surety to be liable to those to whom it contracted not to be liable, and has held that the statute also prevented it from asserting in defense of its liability the very conditions on which it consented to assume liability at all.

A statute which includes within its purview any such effect certainly deprives the parties of liberty of contracting. Our contention is that the denial of the right to contract in these respects is arbitrary and beyond the power of the state.

In passing, we may notice another matter to exclude it from the argument. While the surety in this case is a corporate surety—an insurance company—the case involves no question as to how far a state may regulate the contracts of corporate sureties or insurance companies. The statute in question does not relate to corporate surety business. It affects private and corporate sureties alike.

Nor is the validity of the statute, in so far as it creates a lien in favor of materialmen, in question.

To provide, as this statute in its first and second sections provides, for an automatic lien on funds due

the contractor, in the nature of a garnishment in favor of materialmen, upon notice given the landowner, is neither arbitrary nor unreasonable, though the freedom of contracting between the landowner and the contractor may in a sense be abridged. For the landowner would not be called on to pay more than he contracted to pay. The statute in this respect has merely provided convenient machinery for applying the funds of the contractor to the payment of his debts. Natural equities in favor of the materialmen, as creditors, give reason and constitutional validity to such a provision.

But far different it is for the statute to say that the landowner cannot exercise his constitutional liberty of protecting himself against direct loss on account of the contractor's failure to perform the contract, unless he and the person willing to furnish this special and personal indemnity also so contract as that the surety shall be unconditionally liable to the materialmen, whether their claims exceed the contract price or not. And still further different it is for the statute (as construed by the court) to say that whenever the landowner and a surety make such a special contract of indemnity and expressly agree that they and they alone shall be parties to it and entitled to its benefits, the law will nevertheless, without their consent and over the express terms of the contract, insert into the contract an obligation in favor of the materialmen, thus making a conditional promise to indemnify the landowner an unconditional promise to pay third persons.

Courts cannot make contracts for persons *sui juris* (*Cheney* v. *Libby*, 134 U. S. 68, 33 L. ed. 818); nor can

the legislature do so without violating the liberty guaranteed by the Fourteenth Amendment of the Constitution.

The fact that the liberty of contracting is impaired by indirection instead of by direct means is immaterial. For a statute to prevent the terms of a contract from being enforced according to their natural tenor and effect is violative of the Fourteenth Amendment to the Constitution, though the prohibition of the statute operates indirectly rather than directly.

New York Life Insurance Co. v. *Dodge,* 246 U. S. 357, 377, 62 L. ed. 772, 783.

The right to contract as to one's own affairs is a part of the liberty protected by the due-process-of-law clause of the Constitution.

On this point we feel that we need only cite *Adkins* v. *Children's Hospital,* 261 U. S. 525, 67 L. ed. 785, for in that case the prior authorities are fully collected and discussed. The exceptional cases in which liberty of contract can be abridged are also set forth and distinguished.

As was said by the court of the law then before it, so also it is true of the statute herein attacked, "It is not a law dealing with any business charged with a public interest, or with public work, or to meet and tide over a temporary emergency * * * It is not for the protection of persons under legal disability, or for the prevention of fraud."

See, also, *Mayer* v. *Nebraska,* 262 U. S. 390, 67 L. ed. 1042.

The state courts have usually held such provisions, as are contained in the Mississippi statute, void.

Gibbs v. *Tally,* 133 Cal. 373, 65 Pac. 970.
Montague v. *Furness,* 145 Cal. 205, 78 Pac. 640.
Williams v. *Baldwin,* (Tex.) 228 S. W. 554.
Hess v. *Denham L. Co.,* (Tex.) 218 S. W. 162.
Stinson Mill Co. v. *Braun,* 136 Cal. 122, 57 L. R. A. 726.
Kelly v. *Johnson,* 251 Ill. 135, 95 N. E. 1068, 36 L. R. A. (N. S.) 573.

State statutes which so materially abridge the liberties of private persons in contracting as to their private affairs are violative of the Fourteenth Amendment of the Constitution.

Jay Burns Baking Co. v. *Bryan,* 264 U. S. 504.
Fairmont Creamery Co. v. *Minn.,* 274 U. S. 1.
Tyson v. *Banton,* 273 U. S. 418, 71 L. ed. 718.
Ribnick v. *McBride,* 277 U. S. 350, 72 L. ed. 913.
Woolf v. *Industrial Court,* 262 U. S. 522, 67 L. ed. 1103.
Smith v. *Cahoon,* 283 U. S. 553, 75 L. ed. 1264.

The building of a private structure is a purely private matter, affected with no public use or interest. Materialmen are in no true sense wards of the state; though through the powerful lobbies which their associations maintain they have made strenuous efforts in various states to have themselves treated as if they were, and have succeeded in a number of states in having statutes passed to give them special privileges. A part of the present nationwide depression may well be traced to the effect of some of these statutes—none of which,

so far as we have observed, goes quite as far as the Mississippi statute in infringing private rights of landowners—since the inability of so many otherwise eligible contractors to give surety bonds has increased the cost of construction to where landowners are unwilling to contract for the erection of buildings. If there be a public interest involved in the subject matter, it is not on that side of the question which would uphold this statute.

In Conclusion: The jurisdiction of this court to pass upon the question whether the attacked statute is void because violative of the United States Constitution cannot be successfully challenged on any suggestion that the decision of the Supreme Court of Mississippi can be supported on any nonfederal ground.

The defendant (now appellant) raised the question of the repugnancy of the state statute of the United States Constitution at the threshold of the case by demurrer to the original bill of complaint; the grounds of demurrer being in substance that no action could be maintained, under the statute, on the bond, because the statute was unconstitutional (R. 17). There is nowhere in the record any suggestion of liability on the bond, otherwise than under the statute. The Supreme Court of Mississippi necessarily based its judgment against the appellant on its construction of the statute and by applying the statute as thus construed to the bond. Under the pleadings, the court did not and could not decide the case adversely to the appellant without deciding adversely to the contention of the appellant made in the demurrer,

and in the suggestion of error, that the statute was unconstitutional.

St. Louis & I. M. R. Co. v. *Starbird,* 243 U. S. 592, 61 L. ed. 917.

The constitutional question having arisen by demurrer, the ordinary rule, that this court accepts as final the conclusion of facts made by the state court, does not apply. The only thing binding on this court is the state court's construction of its statute.

Truax v. *Corrigan,* 257 U. S. 312, 66 L. ed. 254, and cases therein cited.

Fiske v. *Kansas,* 274 U. S. 380, 71 L. ed. 1108.

Appleby v. *New York,* 271 U. S. 364, 70 L. ed. 992.

"It is well understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, or whether the state is depriving him of his property without due process of law in violation of the Fourteenth Amendment, and the question turns upon the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution.

"*Railroad Commission* v. *Eastern Texas R. Co.,* 264 U. S. 79, 86, 68 L. ed. 569, 572, 44 S. Ct. 247, and cases cited."

Coolidge v. *Long,* 282 U. S. 582, 75 L. ed. 562.

"When a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purposes, but rather upon its operation and effect

as applied and enforced by the state; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court."

Coppage v. *Kansas,* 236 U. S. 1, 15, 59 L. ed. 441, 446.

Respectfully submitted,

L. BARRETT JONES,
W. CALVIN WELLS,
Attorneys for Appellants.

---,

Of Counsel for Appellants.

APPENDIX.

AN ACT to amend Section 3074 of the Mississippi code of 1906, and to enlarge the rights conferred therein upon materialmen, subcontractors, laborers and journeymen; to prohibit assignments, transfers, or other dispositions in derogation of the rights hereunder created; to make said rights concurrent; to provide that laborers, subcontractors, materialmen and journeymen shall be protected under contractor's bonds and may sue thereon.

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That Section 3074 of the Mississippi code of 1906 be amended so as to read as follows:

"3074. (2714) *Subcontractors, laborers, etc., may bind the amount due the contractor by written notice.* (Laws 1904, chapter 153.) When any contractor or master workman shall not pay any person who may have furnished materials used in the erection, construction, alteration, or repair of any house, building, structure, fixture, boat, water craft, railroad, railroad embankment, or the amount due by him, to any subcontractor therein, or the wages of any journeyman or laborer employed by him therein, any such person, subcontractor, journeyman or laborer may give notice in writing to the owner thereof of the amount due him and claim the benefit of this section; and, thereupon the amount that may be due upon the date of the service of such notice by such owner to the contractor or master workman, shall be bound in the hands of such owner for the payment in full, or if insufficient then pro rata, of all sums due such person, subcontractors, journeymen and laborers, who might lawfully have given notice to said owner hereunder, and,

if after such notice, the contractor or master workman shall bring suit against the owner, the latter may pay into court, the amount due on the contract; and thereupon all persons entitled hereunder, so far as known, shall be made parties and summoned into court to protect their rights, contest the demands of such contractor or master workmen and other claimants; and the court shall cause an issue to be made up and tried and direct the payment of the amount found due in accordance with the provisions hereof; or in case any person entitled to the benefits hereof, shall sue the contractor or master workman, such person so suing shall make the owner and all other persons interested, either as contractors, master workmen, subcontractors, laborers, journeymen or materialmen, so far as known, parties to the suit (and any such party if not made a party in any suit hereunder authorized may interveñe by petition), and, thereupon the owner may pay into the court the amount admitted to be due on the contract or sufficient to pay the sums claimed, and the court shall cause an issue to be made up and award the same to the person lawfully entitled; in either case the owner shall not be liable for costs; but if the owner, when sued, with the contractor or master workmen, shall deny any indebtedness sufficient to satisfy the sums claimed and all costs, the court shall, at the instance of any party interested, cause an issue to be made up to ascertain the true amount of such indebtedness and shall give judgment and award costs according to the rights of the several parties in accordance herewith. In case judgment shall be given against such owner, such judgment shall be a lien, from the date of the original notice, and shall be enforced as other liens provided in this chapter. The owner shall not be liable in any event for a greater amount than the amount contracted for with the contractor.

Assignments by Contractor prohibited.

Sec. 2. No contractor or master workman except as hereinafter provided, shall have the right to assign, transfer, or otherwise dispose of in any way, the contract or the proceeds thereof, to the detriment or prejudice of the subcontractors, journeymen, laborers, and materialmen as declared hereinbefore and all such assignments, transfers, or dispositions shall be subordinate to the said rights of the subcontractors, journeymen, laborers and materialmen, as well as the owner. Provided, however, that this section shall not apply to any contract or agreement where the contractor or the master workman shall enter into a solvent bond conditioned as provided for in section 3 hereof.

Bond to pay for labor and materials furnished.

Sec. 3. That when any contractor or subcontractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor, shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond; and any such person who has furnished labor or materials used therein for which payment has not been made, shall have the rights to intervene and be made a party to any ac-

tion instituted on such bond, and to have his rights adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the rights or claim for damages or otherwise, of the obligee. If the full amount of the liability of the surety thereon is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the obligee, the remainder shall be distributed pro rata among said intervenors. The bond herein provided for may be made by any surety company authorized to do business in the State of Mississippi.

Bond—right of action—by whom.

Sec. 4. If no suit shall be brought by the obligee within six months from the completion and final settlement of said contract, then any person supplying therein labor or materials shall have a right of action on said bond for his use and benefit against said contractors and the sureties thereon and to prosecute same to final judgment and execution, subject to the rights and demands of the owner.

Bond—suit on—when instituted.

Sec. 5. When suit is instituted by any such person on a bond, it shall not be commenced until after the complete performance of said contract, and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later; provided that if the contractor quits or abandons the contract before its completion suit may be instituted by any such person including the owner on said bond and shall be commenced within one year after such abandonment and not later. But said period for the limitation of the institution of said action shall not begin to run until the obligee shall have made said final settlement or determined said abandonment and published notice thereof in some newspaper in said county,

or if there be none then in some newspaper having a general circulation therein.

Bond—suit on—only one action.

Sec. 6. When suit is so instituted by any person only one action shall be brought and any person entitled to sue may upon application intervene and be made a party to said suit; however, such intervention must occur within the time limited for such person to bring an original action.

Judgment on bond—funds insufficient—pro rata recovery.

Sec. 7. If the recovery on the bond should be inadequate to pay the full amount found due including amounts due the owner, judgment shall be given after the obligee is fully satisfied for all claims, demands, rights, and damages to each person pro rata of the amount of the recovery. The sureties on said bond may pay into court for distribution the full amount of their liability less any amount which may have been paid to the obligee by reason of the execution of said bond, upon so doing the surety will be relieved from further liability.

Process—sec. 3064 *code amended.* (*Hemingway code sec.* 2424.)

Sec. 8. To all suits instituted under the provisions of this act the parties interested shall be summoned as provided by section 3064 of code of 1906.

Sec. 9. That this act take effect and be in force from and after its passage.

Approved March 28, 1918."

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 239.

HARTFORD ACCIDENT & INDEMNITY COMPANY AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS,

VS.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

BRIEF OF APPELLANTS IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

L. Barrett Jones,
W. Calvin Wells,
Attorneys for Appellants.

Of Counsel for Appellants.

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Supreme Court of the United States

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HARTFORD ACCIDENT & INDEMNITY COMPANY AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS,

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APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

BRIEF OF APPELLANTS IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM.

POINT I.

Under this point appellee contends:

In the judgment and opinion from which this appeal is sought there is not brought in question any constitutional right or privilege of appellants, but same turns alone upon nonfederal questions of local law and state procedure.

With reference to Point One urged by appellee, this cause, it is submitted, can not be affirmed on the

theory that there is no federal question presented. The record in this cause amply demonstrates that the federal question was raised *eo limine* and consistently and persistently contended for and pursued.

The answer filed by the appellant, Hartford Accident & Indemnity Company, to the intervention of appellee specifically adopted the answer of said appellant to the original bill of complaint filed in the cause in which appellee intervened. (Transcript page 16, Transcript page 13, and also Transcript Cause 333, October Term, 1931, page 39, the Demurrer of the Hartford Accident & Indemnity Company to the Original Bill.)

Moreover, the most casual reading of the opinion of the Supreme Court of Mississippi in affirming the Chancery Court of Adams County, Mississippi, in the present cause, will show that the court based its affirmance upon its prior holding that the statute was constitutional as set out in 155 Miss. 31, 119 So. 366; 161 Miss. 198, 132 So. 535, and in 161 Miss. 222, 135 So. 497.

All of the opinions are before this court as a part of the record.

It is submitted that the various opinions of the Supreme Court of Mississippi upholding the constitutionality of the statute under attack can be read in vain for any statement either of fact or of law that will warrant the conclusion or the contention that the Supreme Court of Mississippi has decided this cause on any ground save the effect of the statute (Sec. 3, Chapter 128, Laws of 1918), whose constitutionality is attacked. In fact, the court flatly puts its decision purely on that statute and on its

constitutionality in face of the ever present contention of appellant that the statute was unconstitutional.

The bond sued on in this cause by appellee and others was so drawn that no suit could have been maintained on it by appellee except for the provisions of the statute. Appellee could not have opened the doors of the courts much less have stayed in court without the statute. The pleadings show that it relied upon the statute, successfully invoked, to aid and it cannot be heard to say now that the statute was not involved and not determinative of the issue. See Paragraph One, cross bill of appellee, pages 5 and 6 of the transcript.

POINT II.

Under this point appellee contends:

The judgments and opinions of the Supreme Court of Mississippi of dates February 23rd and June 15th, 1931 (No. 333, Tr. 67 and 86), were final within the meaning of the Judicial Code, Sec. 237, and when no appeal was perfected therefrom same became the law of the case and binding upon the parties hereto and upon the Mississippi courts in this cause.

It is submitted that the judgments and opinions relied on by appellee under this head were not final within the meaning of the Judicial Code, Section 237.

Appellee's contention here is virtually a plea of *res adjudicata* and it is submitted that the dismissal of the prior appeal in this case (*Hartford Accident & Indemnity Company* v. *Bunn*, 285 U. S. 169), is not conclusive of the merits of the cause and that this appeal is not cut off thereby.

It is pertinent to review the history of appellee's relation to this cause:

There was filed in the Chancery Court of Adams County, Mississippi, a cause styled *Natchez Investment Company, Inc.*, v. *J. V. and R. T. Burkes et al.*, to which cause one A. W. Moore, the assignor of appellee, was made a party defendant under his trade name of Acme Engineering Company. That cause went to final hearing without either Moore or the appellee intervening therein, and while the Chancellor had the cause under advisement, appellee obtained an order permitting it to intervene and the final decree in that cause expressly reserved the jurisdiction of the Chancery Court of Adams County, Mississippi, for the future determination of the issue presented by appellee against the Hartford Accident & Indemnity Company. We quote from transcript No. 333, October Term, 1931, pages 65 and 66, that portion of the decree:

> "And it further appearing unto the court that N. O. Nelson Manufacturing Company as assignee of A. W. Moore, doing business as Acme Engineering Company, obtained leave of the court to intervene in this cause as a defendant and cross complainant as of right by decree rendered by the undersigned Chancellor on the 14th day of August, 1929, duly enrolled in the minutes of this court, and that said N. O. Nelson Manufacturing Company as assignee of A. W. Moore, doing business as Acme Engineering Company, thereafter pursuant to said permission intervened herein and did file its answer and cross bill of complaint seeking to recover against said J. V. & R. T. Burkes and said Hartford Accident & Indemnity Company the principal sum of five thousand nine hundred and seventeen and 53/100 ($5,917.53) dollars and interest and attorneys' fees on said sum for labor and mate-

rials furnished in and about the erection and construction of the Eola Hotel Building in Natchez, Adams County, Mississippi, being Project No. 640; and it further appearing that thereafter Hartford Accident & Indemnity Company filed a motion in this cause moving the court to strike from the files the said intervention and cross bill of complaint of said N. O. Nelson Manufacturing Company; and it further appearing that the issues as to said claim and intervention of said N. O. Nelson Manufacturing Company have not yet been heard or tried by this court, it is thereupon further ordered, adjudged and decreed that said issue as to the intervention and claim of said N. O. Nelson Manufacturing Company be continued to be heard and determined at the regular January Term, 1930, of the Chancery Court of Adams County, Mississippi, it being the intention by this order to reserve unto all parties concerned in said claim and intervention all rights and remedies they would have had not this decree been entered and rendered at this time."

In due time the motion of the appellant referred to was overruled and a demurrer filed by appellant was also overruled and an appeal taken to the Supreme Court of Mississippi, whose opinion on that appeal is found in 160 Miss. 504, 135 So. 349.

In disposing of the contention made by the Hartford Accident & Indemnity Company that appellee had intervened too late, the Supreme Court of Mississippi said:

"The court below committed no error in overruling the motion to dismiss, for, until its final decree was entered, it had full control over the procedure, and the record presents no question of prejudice to the indemnity company because of the permission given the Nelson Manufacturing Company to intervene after the case had been submitted on its merits."

On the remand of the cause the appellant, Hartford Accident & Indemnity Company, answered, raising the federal question heretofore adverted to in discussing Point One of the motion to dismiss or affirm.

It is, therefore, perfectly apparent that appellee itself has taken the position in this cause that its intervention in the Chancery Court of Adams County, Mississippi, was an independent suit, in nowise affected by any previous hearing of the case by that court nor in anywise affected by any previous decision of any court.

The citations of authority by counsel under this point are not applicable to the facts presented by this suit. There has been no appeal heard by this court on the merits. The exact converse is true. The court in *Hartford Accident & Indemnity Company* v. *Bunn,* 285 U. S. 169, declined to consider the appeal and dismissed it, not for want of a federal question but for want of the necessary parties.

It is submitted that unless there has been adjudication on the merits no element of *res adjudicata* or law of the case can be contended for as cutting off the appeal.

POINT III.

Under this point appellee contends:

Pleading and proof presenting exclusive or controlling federal question, condition for jurisdiction here, not in present record.

Appellee, under this heading, raises the contention that no federal question is presented by the suit.

In the first place we are sure that if that had been true the court would not have retained jurisdiction of the

cause upon its consideration of the jurisdictional statement.

Moreover, this is the second time that the court has, upon consideration of the jurisdictional statement, held that a federal question was presented.

We believe that a consideration of the pleadings heretofore referred to in this brief demonstrates beyond all question that the federal question is amply presented in the suit. It has been presented by demurrer, and by answer in the lower court, and by appeal to the Supreme Court of Mississippi, urging the same grounds as raised by both the demurrer and the answer, and moreover, was again raised in a suggestion of error in which it was contended that the construction placed upon the statute by the court in its decisions rendered the statute unconstitutional, if not unconstitutional on its face.

The federal question in this cause did not depend upon proof but, as a matter of fact, all the proof taken on this cause is contained in an agreed statement of facts, shown in transcript 239, page 17.

POINT IV.

Under this point appellee contends:

If the court should hold that it has jurisdiction to review on this appeal, then that determined by the Mississippi Supreme Court was only an interpretation of a local contract in so far as this appellee was concerned.

It is respectfully submitted that this point is utterly without merit.

If the Supreme Court of Mississippi, on any of the appeals involved in this cause, had planted itself upon the so-called contract ground a different issue might be pre-

sented but as we have heretofore observed the most casual reading of those opinions shows that the court squarely placed them upon the constitutionality of the statute attacked.

Also as heretofore stated but for the statute appellee could not have come into court much less have remained therein long enough to have obtained a decree.

Much stress is laid by appellee upon Article 30, set out at page 15 in No. 333. But what appellee overlooks is that, notwithstanding what the rights of the owner might have been to require such a bond, the fact remains that in the final analysis he did not require it but accepted a bond from the contractors which specifically negatived the right of anyone save the obligee to have any right of action thereon and appellee is not in a position to question either the right of the obligee so to do or the effect of his act in so doing.

Appellee must rely upon the statute and its constitutionality or it has no standing in court.

It is submitted that causes are to be decided not upon what persons may have done but upon what they did do, and likewise it is submitted that this appeal involves not a decision of the Supreme Court of Mississippi which it might have rendered but opinions and decisions which it did render, and those opinions and decisions are placed squarely, not upon any contract rights which the appellee had but upon the inherent constitutionality and the controlling effect of the statute attacked.

It is, therefore, submitted that the motion to dismiss or affirm should be overruled.

L. Barrett Jones,
W. Calvin Wells,
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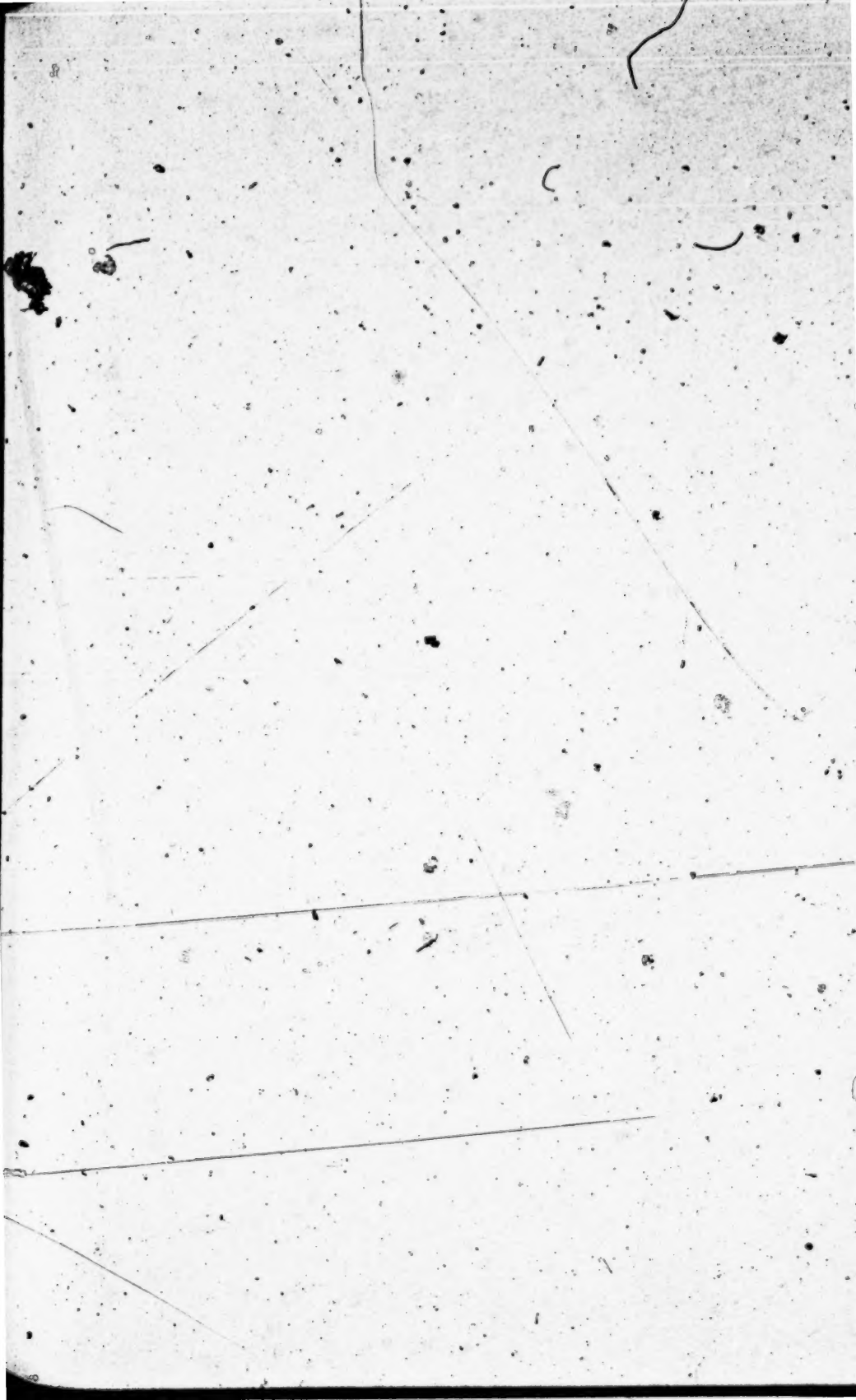
Of Counsel for Appellants.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 239

HARTFORD ACCIDENT & INDEMNITY COMPANY AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS,

vs.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT THEREOF.

GERARD BRANDON,
GERARD H. BRANDON,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 239

HARTFORD ACCIDENT & INDEMNITY COMPANY AND AETNA CASUALTY & SURETY COMPANY, APPELLANTS,

vs.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM, AND BRIEF IN SUPPORT THEREOF.

In pursuance of Paragraph 3 of Rule 12 of the Supreme Court, the appellee, N. O. Nelson Mfg. Co., assignee, herewith files with the Clerk of the Supreme

Court of the United States its statement of matters making against the jurisdiction of the Court on appeal (said matters being assigned under the included motion to dismiss or affirm) and its motion addressed to the Court praying for a dismissal of the appeal or affirmance of the judgment and decree, to-wit:

Motion to Dismiss or Affirm.

Comes N. O. Nelson Mfg. Co., appellee in intervention, and moves to dismiss as to it or affirm for want of jurisdiction and for want of substantial Federal question, and for reasons assigns:

I.

The appeal addressed to the opinion and judgment of the Supreme Court of Mississippi in favor of appellee of date May 1st, 1933, presents nothing reviewable here. The judgment from which this appeal is sought to be had is not one where is drawn in question any constitutional rights or privileges of the appellants, but same was decided alone upon non-Federal questions of local law and of State procedure.

II.

The decree of the Chancery Court of Adams County, Mississippi, in favor of appellee, of date August 8th, 1932, and the opinion and judgment of affirmance of the Supreme Court of Mississippi of date May 1st, 1933, were controlled, dictated, and required by the final opinions and judgments of the Supreme Court of Mississippi in this cause of dates February 23rd, 1931,

and June 15th, 1931, which latter judgments and opinions were final within the meaning of the Judicial Code, Sec. 237, amended (U. S. C. A., Title 28, Sec. 344), from which latter judgments and decrees the same appellants Hartford Accident & Indemnity Company and Ætna Casualty & Surety Company were entitled to prosecute an appeal to the United States Supreme Court within the time provided by Act of February 13th, 1925, Ch. 229, Sec. 8, 43 Stat. 940; U. S. C. A. Title 28, Sec. 350, provided jurisdictional questions and issues were there involved, but from which said appellants did not perfect an appeal.

III.

There are no pleadings and/or proof in the transcript whereunder the judgment of the Supreme Court of Mississippi may be reversed.

IV.

That which was determined by the Supreme Court of Mississippi was only an interpretation of a local contract insofar as this appellee is concerned.

WHEREFORE this appellee, having not been served until June 12th, 1933, with a copy of appellant's jurisdictional statement and designation to print entire record, makes this motion, having specifically reserved its right so thus to do.

GERARD BRANDON,
GERARD H. BRANDON,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 239

HARTFORD ACCIDENT & INDEMNITY COMPANY, ET. AL., APPELLANTS,

vs.

N. O. NELSON MFG. CO., ASSIGNEE, APPELLEE.

APPELLEE'S BRIEF AND ARGUMENT ON MOTION TO DISMISS OR AFFIRM.

General Statement.

This cause had its inception in the Chancery Court of Adams County, Mississippi, wherein on the docket of that court it was numbered No. 5323. This suit was brought by the Natchez Investment Company, owner of the hotel building, against the building contractors, Burkes, building contract surety, Hartford Accident & Indemnity Company, and sundry laborers, mechanics, and materialmen, including appellee's assignor, under provisions of Chapter 128 of the Laws

of Mississippi of 1918 (Hemingway's Code of Mississippi, 1927, Secs. 2596-2603, inclusive), Sections 2274-2881, both inclusive, of the Mississippi Code of 1930. Thereafter this appellee intervened in said cause, being permitted so to do by virtue of said statutes and by decree of the court.

Only excerpts from the pleadings in this cause appear in this record, and, aside from the agreed statement of facts as to some issues, none of the record evidence in this cause has been included in the transcript of this record to the Supreme Court. The appellant has by its præcipe made a part of the record on this appeal the record in this same cause on the appeal attempted to be taken to the Supreme Court of the United States, being transcript of record in Cause No. 333, October Term, 1931, styled *"Hartford Accident & Indemnity Company, Appellant, v. O. L. Bunn, doing business as Bunn Electric Company, et als., Appellees."* We shall hereafter refer to that record as (No. 333, Tr. —).

This appellee intervened in the Chancery Court of Adams County, Mississippi, too late to have judgment rendered in its favor at the time judgments were rendered in favor of the other parties similarly situated in the litigation; but, as to the other parties whose rights were in every wise similar and determined by the same law and facts, the Supreme Court of Mississippi heard this cause, first, upon appeal of the Hartford Accident & Indemnity Company to settle principles involved (No. 333, Tr. 46), and, next, upon appeal on the merits (No. 333, Tr. 67), and, finally, upon a suggestion of error (No. 333, Tr. 86).

In the meantime the Supreme Court of the State of Mississippi had heard this same cause as to the intervention of this appellee to settle principles involved, and had affirmed the Chancery Court and remanded the cause (see reference in opinion of Mississippi Supreme Court here appealed from), and, pending the appeal to the United States Supreme Court (Appeal No. 333, October Term, 1931), no further proceedings were had as to the intervention of this appellee in the Chancery Court of Adams County, Mississippi.

From the final judgment and decree of the Supreme Court of the State of Mississippi (No. 333, Tr. 67 and 86), which judgments were similarly against both the Hartford Accident & Indemnity Company and the Ætna Casualty & Surety Company (as is the judgment in this instance), the Hartford Accident & Indemnity Company alone attempted to prosecute an appeal to the Supreme Court of the United States. As to that appeal this Court held that it had no jurisdiction and dismissed the appeal.

Hartford Accident & Indemnity Company v. *O. L. Bunn et al.*, 285 U. S. 169, 52 S. Ct. 354-357, 76 L. Ed. 685.

Thereafter the mandate of this Court in said cause was sent down to the Supreme Court of the State of Mississippi and the judgment and decree of the Supreme Court of Mississippi became final and binding upon the parties in this cause.

Thereafter this cause came on for trial in the Chancery Court of Adams County, Mississippi, and by agreement of the parties the entire record in this

cause, including all evidence, documentary and oral, and all judgments and decrees in said cause rendered, were offered in evidence and made a part of the record in the issues involving the rights of this appellee.

Thereupon the Chancery Court of Adams County, Mississippi, rendered its judgment in favor of appellee, of date August 8, 1932, and, upon consideration upon appeal, the Supreme Court of Mississippi rendered its opinion on appeal, dated May 1, 1933, from which this appeal is prosecuted.

POINT I.

In the judgment and opinion from which this appeal is sought there is not brought in question any constitutional right or privilege of appellants, but same turns alone upon non-Federal questions of local law and State procedure.

This is apparent from a mere reading of the opinion of the court.

To give the Supreme Court jurisdiction of a writ of error (appeal) to a State court it must appear affirmatively not only that a Federal question was presented for decision, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been rendered without deciding it.

Adams v. *Russell,* 229 U. S. 353, 33 S. Ct. 846, 57 L. Ed. 1224, and cases therein cited.

Where there is involved both a Federal and non-Federal question and where the decision complained of rests on independent grounds not involving Federal

question and broad enough to maintain the judgment, the writ of error (appeal) will be dismissed by this Court without considering any Federal question that may also be presented.

Williams v. *Oliver,* 53 U. S. (12 How.) 111, 13 L. Ed. 915;

Petrie v. *Nampa, etc., Irrigation District,* 248 U. S. 154, 39 S. Ct. 25, 63 L. Ed. 178;

Farson v. *Bird,* 248 U. S. 268, 39 S. Ct. 111, 63 L. Ed. 233.

Even though the State court had based its judgment upon a Federal question as well as upon the ground upon which the decision turned, the Supreme Court is here without jurisdiction.

People ex rel. Doyle v. *Atwell,* 261 U. S. 591, 43 S. Ct. 410, 67 L. Ed. 814.

> "If it appears that the Judgment of the State Court against the Plaintiff in error was based upon a decision of general law broad enough to support the decision, this Court will not consider the Federal question though it was considered and determined by the Court below adversely to the Plaintiff in error."
>
> *Consolidated Turnpike Co.* v. *Norfolk, etc., R. R.,* 228 U. S. 596, 33 S. Ct. 605, 57 L. Ed. 982.

In discussing its jurisdiction upon a Federal question this Court in the case of *Bilby* v. *Stewart,* 246 U. S. 255, 38 S. Ct. 264, 62 L. Ed. 701, held:

> "We need not, however, consider this contention. For since the Supreme Court rested

its judgment upon a non-Federal question adequate to support it, the existence of a Federal question is of no significance." Citing *Cuyahoga Power* v. *Northern Realty Co.*, 244 U. S. 300, 37 S. Ct. 643, 61 L. Ed. 1153.

McCoy v. *Shaw*, 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891.

POINT II.

The judgments and opinions of the Supreme Court of Mississippi of dates February 23rd and June 15th, 1931 (No. 333, Tr. 67 and 86), were final within the meaning of the Judicial Code, Sec. 237, and when no appeal was perfected therefrom same became the law of the case and binding upon the parties hereto and upon the Mississippi courts in this cause.

For consideration of this point reference is made to the foregoing general statement.

The said Judgments (No. 333, Tr. 67 and 86) and the Mandate of this Court were binding upon the Chancery Court of Adams County, Mississippi, and the Supreme Court of Mississippi. The parties hereto agreed that said Judgment should be considered in evidence in the trial of the cause before the Chancery Court of Adams County, Mississippi, involving the rights of this Appellee (see Agreed Statement as to evidence and record). The issues involved had been decided and the decision had become final from which no appeal could be taken to the Supreme Court of the United States. The Chancery Court of Adams County, Mississippi, in view of said Judgments and Opinions and the Mandate of the Supreme Court of the United

States could not do other than render that Judgment for this Appellee nor could the Supreme Court of the State of Mississippi on appeal do otherwise. Such is the jurisprudence, practice and procedure of the State of Mississippi long established.

> "An opinion rendered on a former appeal becomes the law of the case and governs subsequent appeals."
>
> *Kellogg* v. *King*, 114 Miss. 375, 75 So. 134.

In that case the court stated:

> "The opinion heretofore rendered in this case conclusively settles several points of law now argued afresh, and we must follow the law of the case as announced on the first appeal. The conclusions reached by the Court are sound regardless of any law of the case doctrine."

In the case of *New York Life Insurance Company* v. *McIntosh* (Miss.), 46 So. 401, the Supreme Court of Mississippi said:

> "This is the third time this case has been here. It was distinctly held in its second appearance in this Court (41 So. 381) that the state of facts shown on this last appeal would constitute an estoppel against the insurance company; whether that decision was right or wrong, and we think it is right, it is the law of this case."

See also:

Adams v. *Yazoo, etc., R. R.*, 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

Bridgeforth v. *Gray*, 39 Miss. 136.

Stewart v. *Stebbins*, 30 Miss. 66.

Johnson v. *Success Brick Mfg. Co.*, 104 Miss. 217, 62 So. 4.

Green v. *McDonald*, 13 S. & M. 445.

Reed, Tax Collector, v. *Norman Breaux Lumber Co.*, 149 Miss. 395, 115 So. 724.

G. & S. I. R. Co. v. *Simmons*, 152 Miss. 327, 27 So. 144.

Pennington v. *Purcell*, 155 Miss. 554, 125 So. 779.

In the case of *Boothe* v. *Teche Lines, Inc.*, reported in 143 So. 418, which was one of several companion cases arising out of the same automobile accident, the Supreme Court of Mississippi said:

> "This is a companion case to *Teche Lines, Inc.*, v. *Passavanti* (Miss.) 140 So. 677. * * * The evidence in the present case and that is substantially the same in all respects. * * * We held in the Passavanti case, which, as stated, was in all substantial facts the same as this insofar as the question of liability is concerned, that appellant in that case was not entitled to a directed verdict of no liability. The court *en banc* thoroughly considered the question in that case and reached the conclusion that the issue of liability was one for the jury and not for the court. That decision is controlling here."

So it appears conclusively that the judgment and opinion of the Supreme Court of Mississippi, from which this appeal is prosecuted, did not turn upon a

Federal question but upon an independent issue. Any Federal question involved in this case was involved in the previous decisions of the Supreme Court from which these parties, although bound thereby, failed to perfect an appeal to the Supreme Court of the United States. There should be an end to litigation.

That this Court will not now entertain an appeal upon the second judgment is controlled by the decision in the case of *Rio Grande Western Railway Co.* v. *Stringer*, 239 U. S. 44, 36 S. Ct. 5, wherein this Court stated:

> "Manifestly the first judgment was final within the meaning of Judicial Code, Sec. 237 (36 Stat. at L. 1156, Chap. 231 Comp. Stat. 1913, Sec. 1214). It disposed of the whole case on the merits, directed that judgment should be entered, and left nothing to the judicial discretion of the trial court (citing cases) and as the question sought to be presented arose upon the first judgment—it being final in the sense of Sec. 237—it is apparent that the writ of error addressed to the second judgment presents nothing reviewable here."

In the case at bar no appeal can now be had as to the first, and final, decision. The appeal in this instance is an attempt to seek a reversal of that prior judgment, which can not now be done. This Court is also likewise thereby concluded, the parties and the courts below being bound.

> "An appeal from the former judgment of the appellate court, or the prosecution of a writ of error therefrom, was open to appellant.

None having been presented, he can not now complain that the lower court carried out the mandate of the appellate court. The appellate court being concluded upon the last appeal by its former final adjudication, we are likewise concluded upon the present appeal. It is clear therefore that the merits of the controversy are not before us on this appeal."

Henning v. *Eldridge*, 146 Ill. 305, 33 N. E. 754.

If the decision of a Federal question by a State court is rendered unnecessary by the view of the court properly taken of the case, within the scope of the pleadings, the judgment is not open to review in the United States Supreme Court.

Chapman v. *Crane*, 123 U. S. 450, 8 S. Ct. 211, 31 L. Ed. 235.

Consolidated Turnpike Co. v. *Norfolk, etc., R. Co.*, 228 U. S. 596, 33 S. Ct. 605, 57 L. Ed. 982.

This Court can not review mere declaratory judgments.

Liberty Warehouse Co. v. *Burley Tobacco Growers Co-Op. Marketing Ass'n*, 276 U. S. 71, 48 S. Ct. 291, 72 L. Ed. 473.

There is no showing in this record wheresoever that the decision here appealed from turned upon any Federal question.

Point III.

Pleading and proof presenting exclusive or controlling Federal question, condtion for jurisdiction here, not in present record.

Appellee by intervention as well as appellant were both defendants to the original bill (No. 333, Tr. 1). Under State practice, as intervenor, appellee sued appellant, Hartford Accident & Indemnity Company, by cross-bill. As shown by decree of the chancery court oral and documentary evidence on issues present were in record additionally to agreed statement of facts.

Jurisdiction here to review is not general but limited to specific instances where Federal rights were set up in State court and denied.

> *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86, 29 S. Ct. 220, 53 L. Ed. 417;
>
> *Michigan Sugar Co.* v. *Dix,* 185 U. S. 112, 22 S. Ct. 581, 46 L. Ed. 829.

In *San Jose Land, etc., Co.* v. *San Jose Ranch Co.,* 189 U. S. 177, 180, 23 S. Ct. 487, 47 L. Ed. 765, it was said:

> "Under the rule of the court requiring the opinions to be sent up with the record it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed' that it (Federal question) was fully considered in the opinion of the court and ruled against the plaintiff in error."

No such ruling upon a Federal question appears in the opinion of the court upon which the judgment here appealed from was entered.

Here, in an intervention, where the cross-bill, other pleadings, and record disclose issues supporting the judgment of a non-Federal nature and where the proof upon which the decree was rendered does not appear, this Court is without a record upon which to reverse that done below.

Seaver v. *Bigelow*, 5 Wall. (72 U. S.) 208, 18 L. Ed. 595.

McCoy v. *Shaw*, 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891.

Williams v. *Oliver*, 53 U. S. (12 How.) 111, 13 L. Ed. 915.

Suydam v. *Williams*, 20 How. 427, 15 L. Ed. 980.

POINT IV.

If the court should hold that it has jurisdiction to review on this appeal, then that determined by the Mississippi Supreme Court was only an interpretation of a local contract insofar as this appellee was concerned.

In our discussion of this point with reference to the opinions and judgments of the Mississippi courts contained in that portion of the record designated by appellant's præcipe, being the record in Cause No. 333, October Term, 1931, Transcript, pages 46, 57, 67 and 86, for the reasons hereinbefore stated, it is not admitted that said opinions and judgments alone controlled and motivated the opinion and judgment of date May 1st, 1933, here appealed from, but, granting

that such was so, for the sake of this argument, then it is respectfully submitted that the appellant, Hartford Accident & Indemnity Company, is contractually liable to the appellee, and the Mississippi Supreme Court so held, interpreting the standard form of agreement between contractors and owners issued by the American Institute of Architects for use when a stipulated sum forms the basis of payment together with the other contract documents and the provisions and references contained in the performance bond.

The other appellant, Ætna Casualty & Surety Company, assumed its liability as a paid surety upon the state of the record which had been made prior to and was made upon the rendition of the judgment and decree of the Chancery Court of Adams County, Mississippi, in favor of this appellee. The parties then being bound by the prior adjudications in this case, the appellant cannot now complain of the affirmance by the Supreme Court of the State of Mississippi.

Therefore, our further discussion of this point will be with reference only to the contract liability of the appellant, Hartford Accident & Indemnity Company, and as to its liability upon its performance bond as interpreted and construed by the Mississippi courts as Mississippi contracts in the light of the other contract documents thereby adopted and referred to as a part of the bond.

The specific clause in the bond to which we now refer is in the following words:

> "Whereas, the Principal and the Obligee have entered into a certain written Contract (hereinafter called The Contract) dated October 18th,

> 1926, to construct 'Eola Hotel' building, as per plans and specifications #640 as prepared by Weiss & Dreyfous, Architects, New Orleans, La., a copy of which is or may be attached hereto *and is hereby referred to and made a part hereof''* (No. 333, Tr. 18).

Pertinent portions of said building contract, being a written contract, are included in the designated portions of this record.

The agreement, being in writing and annexed, controlled the averments of the pleader as to the rights thereunder arising. *McNeill* v. *Lee*, 79 Miss. 455; *Hanover National Bank* v. *Montgomery*, 79 Miss. 443.

Under *Union Indemnity Company* v. *Acme Blow Pipe Co.*, 117 So. 251, 150 Miss. 332, "The bond was part of the contract and the contract was made part of the bond," Mississippi laws controlling. *Ramsey & Gatlin Construction Co. et al.* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. Ed. 1420.

Under Article 30, quoted at length in opinion Supreme Court (No. 333, Tr. 47) on first appeal, and in the opinion on the Suggestion of Error (No. 333, Tr. 87):

> "It shall be the obligation of every contractor and sub-contractor estimating upon work under this contract operation to figure and to include within his bid to furnish a bond *in the sum and conditioned as the law of the State of Mississippi requires,* in a surety company satisfactory to the Owner or Architect. * * * The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications; it shall protect

> the Owner against all liens or claims that may be filed against the building *according to the laws of the State of Mississippi.*"

As was said in *Pennsylvania Fire Ins. Co.* v. *Gold Issue Min. & M. Co.*, 243 U. S. 95, 61 L. Ed. 616:

> "The construction of the Missouri statute thus adopted hardly leaves a constitutional question open. The defendant had executed a power of attorney that made service on the superintendent the equivalent of personal service. If by a corporate vote it had accepted service in this specific case, there would be no doubt of the jurisdiction of the state court over a transitory action of contract. If it had appointed an agent authorized in terms to receive service in such cases, there would be equally little doubt. *New York, L. E. & W. R. Co.* v. *Estill*, 147 U. S. 591, 37 L. Ed. 292, 13 Sup. Ct. Rep. 444. It did appoint an agent in language that rationally might be held to go to that length. The language has been held to go to that length, and the construction did not deprive the defendant of due process of law even if it took the defendant by surprise, which we have no warrant to assert."

Especially when, under Article 3 (No. 333, Tr. 11), the amount to be paid the contractor was the precise amount of the bond (No. 333, Tr. 18), $316,822.00, and the statute of Mississippi (Sec. 2276, Code 1930, then in effect) provides:

> "When any contractor * * * entering into a formal contract with any person * * * for the construction of any building * * * shall

> enter into a bond with such person guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations *that such contractor * * * shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond,"*

if the owner is to be free from liens as stated by the Mississippi Supreme Court (No. 333, Tr. 55). And that held by the Supreme Court of Mississippi was that this bond so thus by contract did, the Court saying (No. 333, Tr. 55):

> "In determining this question, we are to construe the bond in the light of the contract which the bond refers to, and, in so doing, it will appear *that the parties intended to execute the bond provided for and required by the contract between the owner and contractor*, and, by reference to the quoted provisions in the statement of facts, it will be seen that the contractor was required to give such a bond as was called for by Section 3 of the act; and, we think it was the intention of all the parties to give the bond therein provided for, and that the bond is to be construed in connection with the contract it was designed to protect the owner and contractor,

and that it was so dealt with by all parties. It will be seen from a recital of the bond itself that it referred to the contract, and to the plans and specifications made a part of the contract and the bond. This being true, it is plain we think that it was the intention and purpose of the parties to execute a bond in conformity with Section 3 of the Act above quoted.

"This brings the case within the decision rendered in the case of *U. S. F. & G. Co.* v. *Parsons, et al.*, 147 Miss. 335, 112 So. 469, and that case controls the present case. Consequently, it is manifest that the contractor was free to make assignments of the amount due, and that the amount assigned to the bank was a valid assignment, freed from the claims of the subcontractors, journeymen, laborers and materialmen."

This holding as to the intention of the parties under the contract is a local question. *Ramsey* v. *Gatlin, etc., Co.* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. Ed. 1420. Especially, as by Article 4 (No. 333, Tr. 11) of the contract, which allows payment on account on or about the 1st and 15th of each month, based on contractor's prices for labor and material, thereby each payment to be made by the owner to the contractor was conditioned by the precedent integration into the structure of materials or labor belonging to a third party.

As declared in *Lockland Lumber Co.* v. *Robinson*, 157 N. E. 376, 116 Ohio St. 725, materialmen's lien statutes do not create substantive rights but are remedial, vouchsafing additional means for enforcing payment of a debt.

Article 5 (No. 333, Tr. 12) specifically provides:

> "Before issuance of final certificate the Contractor *shall submit evidence satisfactory to the architect that all pay rolls, material bills and other indebtedness connected with the work have been paid.*"

Article 6 makes "the general conditions * * * specifications and drawings, together with this agreement, form the contract, as if hereto attached or herein repeated" (No. 333, Tr. 12).

Again (No. 333, Tr. 14):

> "*The law of the place of building shall govern the construction of this contract.*"
>
> "The contract documents are complementary and what is called for by *any one shall be* as binding as if *called for by all.*"
>
> "Article 9. *Unless otherwise stipulated, the contractor shall provide and pay for all materials, labor, tools, equipment, light, power, transportation and other facilities necessary for the execution and completion of the work.*"

Article 22, which was not brought up in transcript No. 333, but was in State transcript C. No. 29411, at page 30, provided: "If he (the contractor) should fail to make prompt payment to subcontractors or for material of labor", then the owner might take possession and complete.

Likewise, under Article 24, the Contractor had to submit to the architect an application for each payment, and if required, receipts showing payment for materials and labor (Supreme Court Miss., C. No. 29411, Tr. 31).

Likewise, Article 24, not embraced within this transcript, further provided:

> "If payments are made on account of materials delivered and suitably stored at the site but not incorporated in the work, they shall, if required by the architect, be conditional, upon submission by the Contractor of bill of sale or such other procedure as will establish the owner's title to such material or otherwise adequately protect the owner's interest" (Miss. Supreme Court, C. No. 29411, Tr. 32).
>
> "Article 30. *The owner shall have the right prior* to the signing of the contract, to require the contractor *to furnish bond covering the faithful performance of the contract and the payment of all obligations arising thereunder, in such form as the owner may prescribe and with such sureties as he may approve*" (No. 333, Tr. 15).
>
> "Article 32. Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall have delivered to the owner a complete release of all liens arising out of this contract, or receipts in full in lieu thereof, and, if required in either case, an affidavit that so far as he has knowledge or information the release and receipts include all the labor and material for which a lien could be filed" (No. 333, Tr. 15).
>
> "Article 30 (No. 333, Tr. 16). *It shall be the obligation of every contractor* and subcontractor *estimating upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the owner* or

architect, *contractor likewise to pay the cost of any required cancellation of the same. He shall also secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract.*

"The bond shall also secure the owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi, and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary.

"Obligation of Bondsmen: The Contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contract covering the work executed hereunder. * * * "

"The sureties of the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the owner as guarantors, separately and in solido with the Contractors of the fulfillment of the terms of the foregoing."

See *Union Indemnity Co.* v. *Acme Blow Pipe Co.*, 117 So. 251, 150 Miss. 332; *Commercial Bank of Magee* v. *Evans*, 145 Miss. 643, 112 So. 482; *U. S. F. & G. Co.* v. *Parsons*, 147 Miss. 335, 112 So. 469, 53 A. L. R. 88.

We thus have a specific obligation to include in Burkes', the contractor's, bid a bond conditioned as the law of the State of Mississippi required, and by said Article 30 there is a further declaration that "the con-

tractors' bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contract covering the work executed hereunder." So, when the Indemnity Company made this obligation, a part of its bond along with the declaration that such bond was conditioned as the law of the State of Mississippi required, and then, in addition, declared: "The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as Guarantors, separately and *in solido,* with the contractors of the fulfillment of the terms of the foregoing" (No. 333, Tr. 17). That which went before declares the absolute obligation to pay all persons for materials (Art. 9, No. 333, Tr. 14). By the execution of this bond, appellant accepted this obligation. Therefore, it received a premium computed upon the basis of the law of the State of Mississippi, requiring that appellant execute such an obligation, so securing those furnishing labor and materials; and having so thus been compelled to compute its premium as to include this obligation to pay materialmen and laborers in accordance with the law of Mississippi, it is not competent to pay losses on another and different basis, it being declared in *Insurance Company* v. *Shlenker,* 80 Miss. 667, 32 So. 155:

> "It might decline the insurance if it did not wish to run the moral risk in such a case. The very life of the statute is that the company shall not receive premiums on one basis, and pay losses on another."

So that, if it were not a fact that the Indemnity Company was not obligated to make payments to material-

men, then this provision of this bond is meaningless. It connotes responsibility for the payment which might impute injury to the surety, if certain things were left undone. But the connotation of responsibility is inescapable. Sec. 6, *et seq.*, especially enumerates those things not covered by the bond. In short, if the bond is not to make good the quality of work, nor of efficiency, nor the maintenance, nor for the payment of certain compensation for injuries, why enumerate, and especially why exclude the obligation to pay for labor and material? Note especially Sec. 7, whereunder the obligation is especially declared. This bond must be construed as a part of the plans and specifications, which are by it referred to, and by it made a portion of its obligation. Wheresoever made a portion of this obligation, there is in the bond those certain and specified provisions, that "the contractor shall provide and pay for all the materials, labor * * *" (No. 333, Tr. 14).

It so thus being, thereby Appellant conclusively must be presumed to have meant what it said, and its contract is obligatory, and operative, and materialmen may sue thereon. *Lee* v. *Newman*, 55 Miss. 374, as modified in *Washington* v. *Soria*, 73 Miss. 675. No other interpretation can hereon be placed.

Therefore, that done by the Mississippi Court was the decision of a local question under a contract the interpretation of which by the Supreme Court is here controlling. *Ramsey & Gatlin Const. Co.* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. Ed. 1420.

Compare *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. 850 (Florida 1931), where it was declared:

> "The record discloses that the bond was in the form prescribed by the American Institute of Architects, which has been examined in several jurisdictions and construed as being sufficient to protect subcontractors not formal parties to it or the contract secured by it. *American Surety Company of New York* v. *De Wald*, 30 Ga. App. 606, 118 S. E. 703, text 705; *Hartford Accident & Indemnity Company* v. *W. & J. Knox Net & Twine Company*, 150 Md. 40, 132 A. 261; *Pittsburgh Plate Glass Company, Inc., v. Fidelity & Deposit Company of Maryland*, 193 N. C. 769, 138 S. E. 143; *Mansfield Lumber Company* v. *National Surety Company*, 176 Ark. 1035, 5 S. W. (2d) 294; *Byram Lumber & Supply Company* v. *Page et al.*, 109 Conn. 256, 146 A. 293; *Fidelity & Deposit Company of Baltimore, Maryland, v. Rainer*, 220 Ala. 262, 125 So. 55."

It is true that the form here involved has been somewhat modified, but the Supreme Court of Mississippi held that the modification was not effectual to change the obligation from that therein declared.

Compare *Asheville Supply & Foundry Co.* v. *Catawba Const. Co.* (N. C. 1930), 151 S. E. 93; *Pittsburgh Plate Glass Co., Inc.*, v. *Fidelity & Deposit Co. of Maryland*, 193 N. C. 769, 138 S. E. 143; *Aetna Casualty & Surety Co.* v. *U. S. Gypsum Co.*, 39 S. W. (2d) (Ky. 1931) 234; *Concrete Steel Co.* v. *Illinois Surety Co.* (Wis. 1916), 157 N. W. 543, 163 Wis. 41; *Algonite Stone Mfg. Co.* v. *F. & Dep. Co. of Maryland* (Kans. 1917), 163 Pac. 1076, 100 Kans. 28; *Aetna Casualty & Surety Co.* v. *Big Rock Stone & Material Co.*

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That for the contrary ruling as a matter of interpretation, compare *Central Supply Co.* v. *U. S. F. & G. Co.*, 173 N. E. (Mass. 1930) 697; *Maryland Casualty Co.* v. *Johnson*, 15 F. (2d) 253.

This statute of Mississippi is modeled upon the statute of the United States dealing with public contracts, which has been sustained and construed in *United States* v. *American Surety Co.*, 200 U. S. 200, 50 L. Ed. 441; *Mankin* v. *United States*, 215 U. S. 236, 54 L. Ed. 316; *Illinois Surety Co.* v. *John Davis Company*, 244 U. S. 375, 61 L. Ed. 1206.

It was perfectly competent for the Mississippi Court, as a matter of intention, to segregate this bond into two obligations, one in favor of the owner, the other in favor of the materialmen, the contract so thus reading. *United States* v. *National Surety Co.*, 34 C. C. A. 528, 92 Fed. 551; *Dewey* v. *State*, 91 Ind. 173; *Doll* v. *Crume*, 41 Neb. 655, 59 N. W. 806; *Steffes* v. *Lemke*, 40 Minn. 97; *Kansas City Hydraulic Press Brick Co.* v. *Natl. Surety Co.* (Mo. 1906), 149 Fed. 507; *U. S. F. & G. Co.* v. *Omaha*, 116 Fed. 145; *Pingrey on Suretyship and Guaranty*, Sec. 112, 1. 139.

Further, this contract by a paid surety is to be most favorably interpreted for Appellee. *American Life*

& Accident Ins. Co. v. *Nirdlinger,* 113 Miss. 74, 73 So. 875; *United States Fidelity & Guaranty Co.* v. *Citizens State Bank of Moorhead,* 116 So. 608, 150 Miss. 386.

With Appellant in the business for profit it unquestionably computed the premium upon the basis of this imposition and as said in *Byram Lumber & Supply Co.* v. *Page,* 109 Conn. (1929) 256, 146 A. 293:

> "It would be to close our eyes to the ordinary methods of such a business as it was conducting to doubt that it knew of the diverse views taken in regard to the construction of such bonds in different states; that it did not stand ready to accept a construction favorable to a direct action by persons situated like the plaintiff, if we should so construe the bond, and did not fix its premium accordingly. In that construction there can be no injustice to the appellant, and we can recognize the sound policy which it will serve."
>
> *U. S. F. & G. Co.* v. *United States,* 191 U. S. 416, 24 S. Ct. 142, 48 L. Ed. 242, 246.

The Indemnity Company, doing business in Mississippi where all such obligations had been specifically sitused (Sec. 5818, Hemingway's Code, 1927, quoted in *Fidelity Mutual Ins. Co.* v. *Miazza,* 93 Miss. 18, 46 So. 817), agreed that it would be bound in manner and form as by the law of the State of Mississippi required, and that its bond was to be "in the sum and conditioned as the law of the State of Mississippi requires" (No. 333, Tr. 17). The requirements of the

law of the State of Mississippi cannot now be in doubt. This act was on the statute books, plain and unambiguous, and being so thus, the Appellant was admitted to do business upon condition of compliance with all laws of the State of Mississippi (Section 5136, Code 1930), and this was one.

As said in *Union Indemnity Co.* v. *Acme Blow Pipe Co.*, 117 So. 251, 150 Miss. 332:

> "It would be far better for those corporations, whose existence and maintenance depends upon following the law, to observe it rather than to flout it, or seek to contract against it. They are under no compulsion to make such bonds, but if they make them, such bonds will be construed and applied as if they had complied with the law."

The bond which it executed specifically declares (No. 333, Tr. 18):

> "Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the contract) dated October 18, 1926, to construct 'Eola Hotel' building as per plans and specifications * * * a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof."

Hence, a specific obligation definitely set out was there referred to, and by said Article 30 it was expressly provided that in addition there is "also the bond should secure the owner the full and faithful performance of the contract."

We thus have a specific obligation to include in Burke's bid a bond conditioned as the law of the State of Mississippi required, and by said Article 30 there is a further declaration that "the contractors' bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contract covering the work executed hereunder," so, when the Indemnity Company made this obligation a part of its bond along with the declaration that such bond was conditioned as the law of the State of Mississippi required, and then, in addition, declared: "The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as Guarantors, separately and *in solido* with the contractors of the fulfillment of the terms of the foregoing" (No. 333, Tr. 17). That which went before declared the absolute obligation to pay all persons for materials (Art. 9, No. 333, Tr. 14). Its meaning as a contract is solely a State question. *Ramsey & Gatlin Con. Co.* v. *Vincennes Bridge Co., supra.*

This Court has been liberal in protecting materialmen and sustaining the validity of legislation to that end. *Great Southern Fire Proof Hotel Co.* v. *Jones,* 193 U. S. 540, 48 L. Ed. 787; s. c., 30 C. C. A. 108, 86 Fed. 371.

We therefore submit that the judgment should be affirmed because based upon a construction of a local contract, even though the Federal question was raised, for the local question is an adequate basis for the decision rendered. *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 8, 75 L. Ed. 134; *Susquehanna*

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Respectfully,

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All italics ours.

Service of copy of the foregoing Statement, Motion, and Brief is hereby acknowledged.
This June 19th, A. D. 1933.

L. BARRETT JONES,
W. COLVIN WELLS,
Counsel for Appellant.

FILE COPY

DEC 30 1933

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 239

HARTFORD ACCIDENT & INDEMNITY COMPANY AND ÆTNA CASUALTY & SURETY COMPANY,
APPELLANTS,

vs.

N. O. NELSON MANUFACTURING COMPANY,
ASSIGNEE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF ON THE MERITS FOR APPELLEE.

GERARD BRANDON,
GERARD H. BRANDON,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 239

HARTFORD ACCIDENT & INDEMNITY COMPANY AND ÆTNA CASUALTY & SURETY COMPANY, APPELLANTS,

vs.

N. O. NELSON MANUFACTURING COMPANY, ASSIGNEE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF ON THE MERITS FOR APPELLEE.

Express Reservation.

This Appellee, having heretofore filed Statement Opposing Jurisdiction, Motion to Dismiss or Affirm, and Brief in Support thereof, hereby expressly reserves in this Brief upon the Merits all the rights therein claimed and first hereby insists upon said Motion.

Statement of the Case.

This cause had its inception in the Chancery Court of Adams County, Mississippi, wherein on the docket of that Court it was numbered No. 5323. This suit was brought by the Natchez Investment Company, owner of the hotel building constructed, against the building contractors, Burkes, building contract sureties, Hartford Accident & Indemnity Company, and sundry laborers, mechanics, and materialmen, including this Appellee's assignor, under provisions of Chapter 128 of the Laws of Mississippi of 1918 (Hemingway's Code of Mississippi, 1927, Sections 2596–2603, inclusive; Sections 2274–2881, both inclusive, of the Mississippi Code of 1930).

This case involves the liability in equity of the surety, Appellant, on the building contractor's bond for materials, furnished to the contractor for the building of the Eola Hotel at Natchez, Mississippi, by the Natchez Investment Company, the owner.

The questions arising on this appeal are:

(1) The construction of the bond and the measure of liability of the surety thereon for materials furnished the contractor, principal in the bond, as a common law obligation.

This proposition has been fully briefed in our Motion to Dismiss or Affirm (Point IV) which is hereby adopted to save repetition.

(2) Whether appellant, a paid surety, doing an insurance business, and receiving compensation for such suretyship admeasured by the risk assumed, can question the constitutionality of the statutes of Mississippi. Section 3074, Code 1906, as amended by Chapter 128, Laws of 1918, (now Secs. 2274-2281, Code 1930), even if the bond was executed under said statutes.

(3) Said Chapter 128, Laws of Mississippi, 1918, (Sections 2274–2281, Code of 1930), does not violate the Federal Constitution.

(4) Whether an appeal can be taken to this Court upon the Judgment and Decree of the Supreme Court of the State of Mississippi of date May 1, 1933, whereas that Judgment and Decree and the Judgment and Decree of the Chancery Court of Adams County, Mississippi, of date August 8, 1932, thereby affirmed, were controlled, dictated, and required by the final and appealable opinions and judgments of the Supreme Court of Mississippi in this cause of dates February 23, 1931, and June 15, 1931.

This proposition has been fully briefed in our Motion to Dismiss or Affirm, Point II, which is hereby adopted to save repetition.

The Pleadings and Evidence.

The Appellant has by its præcipe made a part of the record on this appeal adopted the record in the same cause on the appeal attempted to be taken to the Supreme Court of the United States, being transcript of record in Cause No. 333, October Term, 1931, styled "*Hartford Accident & Indemnity Company, Appellant*, v. *O. L. Bunn, doing business as Bunn Electric Company, et als., Appellees.*" We shall hereafter refer to that record as (No. 333, Tr. —); We shall refer to the transcript of the record in this cause pending at the October Term, 1933, as (No. 239, Tr. —).

The Natchez Investment Company, the owner of the hotel constructed, obligee of the bond of the contractors, Burkes, filed its original bill in equity against (*a*) Burkes, the contractor; (b) appellant, the surety on the contractor's bond; (*c*) the materialmen and laborers who furnished the labor and materials to the contractor for the construction of the

hotel; (*d*) and New Orleans Bank & Trust Company, assignee of certain proceeds arising from the contract of construction, defendants to the bill.

The bill averred that the owner "is entitled to have it ascertained and determined whether said bond" (of appellant) "in connection with said contract and specification is a bond *for the faithful performance of said contract or simply a bond of indemnity.*" (No. 333, Tr. 8). Reference is made specifically in the bond to concursus proceedings and the plans are made part thereof.

The prayer was to adjudicate whether this bond was for the faithful performance and thereby superior to all liabilities provided by Section 2, Chapter 128, Laws 1918, or subject thereto (No. 333, Tr. 9).

The agreement, Exhibit "A" (No. 333, Tr. 10), is "the standard form of agreement between contractors and owners for construction of buildings, issued by American Institute of Architects for use when a stipulated sum forms the basis of payment." *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. (Fla.) 851, shows it slightly modified, but the Supreme Court of Mississippi held its obligation the same.

> "Article 6: *The Contract Documents*—The general conditions of the contract, the specifications, the drawings, together with this agreement, form the contract, and they are as fully a part of the contract as if hereto or herein repeated" (No. 333, Tr. 12).

By the terms of the contract documents the contractor obligated itself to give a bond to secure the owner the faithful performance of the contract in strict accordance with the plans and specifications.

Amongst the obligations thereby intended to be secured were the obligations of the contractor to pay laborers, materialmen and sub-contractors for all work, labor, and material that should go into the building.

It was further provided in the contract documents that the contractor's bondsmen should obligate themselves to all the terms and covenants of the specifications and of the contracts and contract documents, and amongst these obligations of the contract so to be guaranteed was the contractor's obligation to pay for all labor and material that should go into the building.

Furthermore, by the contract documents it was provided that the sureties of the various contractors (which necessarily included the principal contractors, J. V. & R. T. Burkes) should be, and they thereby declared and acknowledged themselves to be, bound to the owner as guarantors separately and *in solido* with the contractors for the fulfilment of the terms of the contract documents.

This, necessarily, made the sureties assume all the obligations of the contractor under the contract documents and made such sureties liable for said obligations separately and *in solido* and, therefore, to all intents and purposes, as principals.

Amongst the obligations thereby intended to be covered was the obligation of the contractor to pay for labor and material (No. 333, Tr. 3, 4). When this Appellant, Hartford Accident & Indemnity Company, executed its bond at the solicitation of J. V. & R. T. Burkes, and in pursuance of the contract made between Burkes and the Owner, the Hartford Accident & Indemnity Company on the face of its bond referred to the plans and specifications and contract documents, and by specific reference made the same in all their parts and clauses a part and parcel of the bond itself (No. 333, Tr. 18).

We submit in the first instance that these obligations so specifically undertaken by Hartford Accident & Indemnity Company were undertaken by it solely and in consideration of the premium paid to it by the contractors.

Under local practice, upon demurrer, exhibits control the averments of the pleading (*McNeill* v. *Lee*, 79 Miss. 455). The specifications appear, Exhibit "B" (No. 333, Tr. 14); the bond, Exhibit "C" (No. 333, Tr. 17).

The appellant demurred (No. 333, Tr. 39), assigning, roughly, first, the bond was not a performance bond under Chapter 128, Laws 1918, but if the court should hold otherwise, then, in virtue thereof, the constitutional rights of appellant were violated.

The demurrer was overruled (No. 333, Tr. 41) with an appeal allowed to the Supreme Court to settle the principles of the case. Upon appeal judgment of affirmance was rendered by the Supreme Court of Mississippi (No. 333, Tr. 57). Then, as to the several materialmen who were appellees in the formerly attempted appeal, nothing further appears to have been done in the Chancery Court, save the rendition on January 10, 1930, of final decree (No. 333, Tr. 57) upon a full hearing upon the merits.

After the hearing upon the merits, but before final judgment (No. 333, Tr. 57) was rendered by the Chancery Court, this appellee, N. O. Nelson Manufacturing Company, by consent of the court intervened and filed its Intervention, Answer, and Cross-Bill of Complaint (No. 239, Tr. 1–13). This appellee intervened too late to have judgment rendered in its favor at the same time judgments final were rendered in favor of the other parties similarly situated in the litigation, but as to the other parties whose rights were in everywise similar and determined by the same law and facts, the Supreme Court of Mississippi heard this cause upon the final appeal taken to the Supreme Court of Mississippi from the final judgment and decree of the Chancery Court of Adams County, Mississippi (No. 333, Tr. 57), and rendered its final judgment of affirmance upon the merits February 23, 1931 (No. 333, Tr. 67, and 74 through 83), and upon Suggestion of Error by the Appellant June 15, 1931 (No. 333, Tr. 86).

Pending the proceedings had as above set forth as to the rights of other parties similarly situated, the Supreme Court of the State of Mississippi had heard this same cause as to the Intervention of this Appellee to settle the principles involved and had affirmed the Chancery Court and remanded the cause to the Chancellor. See references and opinion of Mississippi Supreme Court here appealed from (No. 239, Tr. 27). And pending the appeal attempted to the United States Supreme Court (Appeal No. 333, Oct. Term, 1931) no further proceedings were had as to the Intervention of this Appellee in the Chancery Court of Adams County, Mississippi. Upon the Supreme Court of the United States having dismissed the appeal taken in the United States Supreme Court (No. 333, October Term, 1931) (*Hartford Accident & Indemnity Company* v. *O. L. Bunn et al.*, 285 U. S. 169, 52 Sup. Ct. 354, 357, 76 L. Ed. 685), and the mandate of that court having been sent down to the Supreme Court of the State of Mississippi, the judgment and decree of the Supreme Court of Mississippi became final and binding upon the parties in this cause. Thereupon this cause as to the Intervention of this Appellee came on for trial in the Chancery Court of Adams County, Mississippi, and by agreement of the parties, the entire record in this cause, including all evidence documentary and oral and all judgments and decrees in said cause rendered, were offered in evidence and made a part of the record in the issues involving the rights of this Appellee. Thereupon, upon that record and the agreed statements of facts, the Chancery Court of Adams County, Mississippi, rendered its judgment in favor of this Appellee of date August 8, 1932 (No. 239, Tr. 25). From that final judgment an appeal was taken by the Appellant to the Supreme Court of the State of Mississippi which rendered its opinion and judgment here appealed from of date May 1, 1933 (No. 239, Tr. 27 and 28).

Point I.

Appellant, doing an insurance business, and thereby subject to plenary State jurisdiction, having been paid a premium for the obligation as enforced by the State court is not, on this record, entitled to raise a Federal question with this premium in its pocket.

Point II.

Section 3, Chapter 128, Laws of 1918, does not violate the Federal Constitution, in that, Appellee, a materialman, having placed its personalty—material—in a building upon the land of the owner, for whose construction, including both material and labor, appellant, surety company, had become responsible, the State can, in virtue thereof, impose liability upon such paid corporate surety, voluntarily executing a performance bond.

Point III.

Said Chapter 128, Laws of Mississippi, 1918 (Secs. 2274–2281, Code 1930), does not violate the Federal Constitution.

Point IV.

Should the court determine Section 3 aforesaid to be unconstitutional, yet notwithstanding, the bond executed may be sustained as a valid common law obligation and the judgment of the Supreme Court of Mississippi cannot be reversed, as an adequate obligation existed under this common law obligation for judgment rendered.

Point V.

The Judgments and Opinions of the Supreme Court of Mississippi of dates February 23, and June 15, 1931 (No. 333, Tr. 67 and 86) were final within the meaning of the

JUDICIAL CODE, SEC. 237, AND NO APPEAL HAVING BEEN PERFECTED THEREFROM, THE SAME BECAME THE LAW OF THE CASE AND BINDING UPON ALL PARTIES HERETO AND UPON THE MISSISSIPPI COURTS IN THIS CAUSE, WHEREBY ALL QUESTIONS RAISED ON THIS APPEAL ARE RES ADJUDICATA. THE APPELLANT NOT HAVING PERFECTED AN APPEAL FROM SAID PRIOR AND FINAL JUDGMENTS CAN NOT APPEAL FROM THE JUDGMENT AND DECREE OF THE SUPREME COURT OF MISSISSIPPI OF DATE MAY 1, 1933.

POINT I.

Appellant, doing an insurance business, and thereby subject to plenary State jurisdiction, having been paid a premium for the obligation as enforced by the State court is not, on this record, entitled to raise a Federal question, with this premium in its pocket

Section 5129, Code of Miss., 1930 (Sections 2550, 2557, Code of 1906), makes Surety Companies transacting business in Mississippi, insurance companies.

Section 5131, Code of 1930 (Section 2563, Code 1906), gives all such contracts a Mississippi *situs*. *Fidelity, etc., Co.* v. *Miazza*, 93 Miss. 18, 46 So. 817.

As said in *Insurance Co.* v. *Yates*, 214 Ill. 272, 73 N. E. 423:

> "*It*" (*insurance*) "*is a public necessity that deals in its own credit for a cash consideration from the assured, and is stamped with public interest, and must yield obedience to the necessary and proper regulations by the State in the exercise of its police power.*"

In *U. S. F. & G. Co.* v. *Citizens State Bank*, 150 Miss. 386, 116 So. 608, Mr. Justice Pack said:

> "* * * This being a fidelity bond, it is now well settled that such contracts are to be construed by the same principles of law applicable to insurance contracts."

United States, etc., Co. v. *United States*, 191 U. S. 422, 48 L. Ed. 245; *Home Insurance Co. of N. Y.* v. *Moore*, 151 Miss. 189, 117 So. 524; *United States Fidelity & Guaranty Co.* v. *Hood*, 124 Miss. 548, 87 So. 115, 15 A. L. R. 605; *Murray* v. *Metropolitan Life Ins. Co.*, 145 Miss. 266, 110 So. 660; *Hormel* v. *American Bonding Co.*, 33 L. R. A. (N. S.) 513 (monographic note).

The rule is thus stated in *American Surety Co.* v. *Pangburn*, 182 Ind. 116, 105 N. E. 769, 770:

> "* * * The overwhelming weight of recent American authority does not accord such surety the right to invoke the rule of *strictissimi juris*, but places such contracts in the insurance class and measures the right of such surety by the law applicable to insurance contracts. *United States Fidelity & Guaranty Co.* v. *Poetker*, 180 Ind. 255, 102 N. E. 372, and authorities cited; Monographic note to *Hormel & Co.* v. *American Bonding Co.*, 33 L. R. A. (N. S.) 513."

In *Lackland* v. *Renshaw*, 165 S. W. 314, 315, the Court said:

> "* * * While such corporations may call themselves 'surety companies', their business is in all essential particulars that of insurance. Their contracts are usually in terms prepared by themselves. * * *"

Therefore, being engaged in the business of insurance, as to appellant, the Legislative power is admeasured by *German Alliance Co.* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011; *O'Gorman* v. *Hartford F. Ins. Co.*, 282 U. S. 251, 75 L. Ed. 324, 72 A. L. R. 1163, 51 Sup. Ct. 130; *Tyson* v. *Banton*, 273 U. S. 418, 434, 71 L. Ed. 718, 724; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden*, — U. S. —, Oct. Term, 1931, Advance Op. No. 3, page 65; *Herbring* v. *Lee*, 280 U. S. 111, 74 L. Ed. 217.

As was said by Mr. Justice McKenna in the *Lewis case, supra:*

> "We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling, if not compelling it."

The appellant does not show what premium it exacted from the owner for the obligation hereunder assumed, that is to say, whether this premium received covered compensation exacted by appellant for the payment to the subcontractors, as by the Mississippi court held, or did not. The form was taken from Louisiana (Opinion of Ethridge, P. J. 333 Tr., 88). In Louisiana, the obligation to give a bond for payment to subcontractors is compulsory. Act 298, Laws of 1926, La. Without question, recovery to subcontractors therein have been in all instances vouchsafed. *Stewart* v. *Segal*, 126 So. 718, 13 La. App. 359; *McDonald* v. *H. Gas & Oil Co.*, 2 La. App. 241; *Baton Rouge Sash, etc., Co.* v. *Deceur*, 2 La. App. 129; *Jabart* v. *U. S. F. & G. Co.*, 3 La. App. 525.

And the surety under the Louisiana Law knew that claims of materialmen against the surety on the contractor's bond were not affected by a breach of contract by the owner. *Fidelity Homestead Assn.* v. *Kennedy*, 158 La. 1059, 105 So. 64. And further well knew when using this form that the surety on a contractor's bond is limited to defenses that can be made by the contractor in a suit

for materials furnished to contractor. *Graphic Arts Bldg. Co.* v. *Union Indemnity Co.*, 163 La. 1, 111 So. 470.

The appellant well knew the contrariety of judicial opinion, and being an insurance company did not disregard the possibility of this imposition and, with full knowledge of the statutes, and the terms and provisions of the contract with reference to which the bond was given, exacted a premium therefor which having been imposed and collected thereby imposed upon it this liability to subcontractors. *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. (Fla.) 851.

Thus so knowing, appellant computed the premium exacted. It is not herein shown that the premium herein exacted for the covenant undertaken was not the full premium requisite under the Louisiana law (or under the Mississippi Law) to make payment to all subcontractors and as enforced by the Mississippi court in this case. If so, then, when in virtue of this payment, so thus exacted to cover this obligation to subcontractors as to materialmen, precisely as in case of Government contracts, the appellant is estopped to raise the Federal question,—*when it has in its pocket the premium requisite to pay therefor;* to allow it to escape the payment would be to donate to the appellant, an insurance company, something to which it was not entitled,—the excess premium. Having received the benefit in the form of this premium for the assumption of the obligation, it may not contest it. *Frost* v. *Corporation Commission*, 278 U. S. 531, 73 L. Ed. 492; *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 307, 73 L. Ed. 395; *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 61 L. Ed. 1229; *Leonard* v. *Vicksburg, etc., R. Co.*, 198 U. S. 416, 49 L. Ed. 1108.

Being a paid surety, engaged in the insurance business, and its obligation to the materialmen being conditioned by its exaction of the owner for the undertaking had, the

right of such appellant to urge the unconstitutionality must be admeasured by the premium exacted,—whether irrespective of the constitutionality or unconstitutionality, it exacted of the owner the full premium covering the unconditional payment as above delineated, it may not, having thus so done, complain of the act being unconstitutional. *Especially is this so, as the appellant assumed to make the bond conditioned as by law required,* which bond might well be valid as a common law obligation independently of the statute as such,—the terms of the statute having been contractually incorporated into the terms of the bond by the references in that instrument to the terms of the contract obligations. *American Indemnity Co.* v. *Burrows Hardware Co.* (Tex. Civ. App.), 191 S. W. 574.

In *Byram Lumber & Supply Co.* v. *Page,* 109 Conn. (1929) 256, 146 A. 293, it is said:

> "It would be to close our eyes to the ordinary methods of such a business as it was conducting to doubt that it knew the diverse views taken in regard to the construction of such bonds in different states: that it did not stand ready to accept a construction favorable to a direct action by persons situated like the plaintiff, if we should so construe the bond, and did not fix its premium accordingly. In that construction there can be no injustice to the appellant, and we can recognize the sound policy which it will serve."

U. S. F. & G. Co. v. *United States,* 191 U. S. 416, 24 S. Ct. 142, 48 L. Ed. 242, 246; *Algonite Stone Mfg. Co.* v. *F. & Dep. Co. of Maryland* (Kans. 1917), 163 Pac. 1076, 100 Kans. 28.

There is no pretense here that the amount paid by the owner for this bond was any different from what would have been exacted for a contract in behalf of the United States Government whereunder this precise obligation here enforced was inherent. This same argument was

made by the Appellees on the formerly attempted appeal by the same appellant before this court. Thereafter the trial upon this intervention was had before the Chancery Court of Adams County, Miss. Had the surety company been able to have bettered its position by showing a smaller premium exacted then most assuredly it would have done so, and so shown in this record. The surety company, thus doing business for profit, must have admeasured its premium so as to cover the contingency for satisfaction of subcontractors and materialmen, and having thus received a premium therefor, may not under Mississippi decisions pay losses upon a different basis. *Insurance Company* v. *Shlenker,* 80 Miss. 667, 32 So. 155, where it is declared:

> "It might decline the insurance if it did not wish to run the moral risk in such a case. The very life of the statute is that the company shall not receive premiums on one basis, and pay losses on another."

And it not being shown that the premium exacted did not cover the payment to subcontractors, this paid surety may not be discharged because proof of damage conditions release generally. There is no evidence or showing in this record that the surety company was in any wise damaged, or that its position was in any wise jeopardized, by any act or breach of the bond or contract by the owner, Natchez Investment Company. Obviously the Chancellor in the trial court resolved any such issues of fact against this appellant. This Court will not presume evidence of damage where the record discloses none. Compare: *Guaranty Co.* v. *Pressed Brick Co.,* 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; *City of Philadelphia* v. *Fidelity & Dep. Co.,* 231 Pa. 208, 80 Atl. 62; *Murray City* v. *Banks,* 219 Pac. 246, 248; *Standard Salt & Cement Co.* v. *Nat.*

Surety Co., 134 Minn. 121, 158 N. W. 802; *United States* v. *U. S. F. & G. Co.* (C. C.), 178 Fed. 721.

So, where appellant, as an insurance company, contracted as it did, for a consideration to it paid, knowing the contrariety of judicial decisions upon this subject, and knowing that the form utilized from Louisiana required the payment specifically, and knowing that the contract documents (made a part of the bond) referred to the Mississippi Statute requiring the obligations in favor of subcontractors and materialmen, it may not as a paid surety seek exculpation without a demonstration that the premium exacted did not cover the risk inherent to payment of the demands of subcontractors and materialmen precisely as was contemplated the Louisiana statute whereon the bond was drawn and as held by the Mississippi Courts with reference to the Mississippi statute. It not appearing, therefore, that appellant is now required to do other than that wherefore it exacted a premium, it, as an insurance company, may not herein complain. The rights that appertain to a private individual may not be claimed by a corporation *when dealing in a business affected with a public use.* Compare: *Blake* v. *McClung*, 172 U. S. 239, 43 L. Ed. 432; *Herbring* v. *Lee*, 280 U. S. 116, 74 L. Ed. 221; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden, supra.*

Point II.

Section 3, Chapter 128, Laws of 1918, does not violate the Federal Constitution, in that appellees, materialmen, having placed their property—material—in a building upon the land of the owner, for whose construction, including both material and labor, appellant, surety company, had become responsible, the State can, in virtue thereof, impose liability upon such paid corporate surety, voluntarily executing a performance bond.

We advert to, by reference, that appellant was in the insurance business for a consideration pursuant to permission therefor granted by Mississippi under its plenary power. Unless Appellee receives from appellant pay for the material of its assignor integrated into a structure wherefor appellant was responsible—bound to deliver it as an entirety free of liens—they will go unpaid.

In Mississippi, initially, the sole protection provided materialmen was found in Section 3074, Code of 1906, whereunder immediately, when the contract was made the contractor might assign and defeat all rights of the materialmen. *Spengler* v. *Lumber Co.*, 94 Miss. 780, 48 So. 966. And therein the differentiation was made between the New York theory of subcontractor's rights and the Pennsylvania theory, and with reference to said section it was remarked:

> "*This section might have provided, if the legislature had preferred the Pennsylvania system, that no assignment should be made by the contractor which would be good against the materialmen;* but it did not so provide. It might have expressly given the materialmen and the subcontractors, as the Pennsylvania system does, direct liens, equal in all respects to the lien of the original contractor; but it expressly refused to do that."

In *Dickson* v. *United States F. & G. Co.*, 117 So. 248, 150 Miss. 864, Mr. Justice Anderson said:

> "Prior to the adoption of chapter 128, Laws of 1918 (Miss.), Hemingway's Code 1927, Sections 2596 to 2603, inclusive, money due a contractor under a building contract was not impressed with any trust or equity in favor of materialmen and laborers furnishing materials and labor going into the construction of a building. Such funds, under the contract, belonged to the contractor absolutely, who had the right to assign or otherwise dispose of them as he saw fit, although to the prejudice of such laborers and materialmen. * * * But that is not true now since the adoption of that statute unless the contractor gives the bond provided by section 3 of the statute (section 2598, Hemingway's Code 1927), quoted above. If the contractor does not give the bond provided by the statute, laborers and materialmen have an equity under section 1 of the statute, Hemingway's Code 1927, Section 2596, in the funds due the contractor by the owner of the building. *But where the bond is given as provided by the statute, such funds are released from such equity or trust in favor of materialmen and laborers and go into the hands of the contractor untrammeled.* The purpose of the bond section of the statute was to provide for a protection of materialmen and laborers, the bond being in lieu of their equity in the funds arising out of the building contract. *The bond provided by the statute has the same purpose and effect as the bond required of a contractor doing public work by section* 1, *chapter* 217, *Laws of* 1918 (*Hemingway's Code* 1927, *Section* 2617)." (Italics ours.)

This is a direct decision putting this bond upon the precise basis, as to purpose dictated by wholesome public policy, made available by Congress and uniformly enforced without question by this Court.

See, also, *Davis Co.* v. *D'Lo Guaranty Bank*, 133 So. (Miss. 1931) 223, 160 Miss. 206.

At the same session of the Mississippi Legislature Chapter 217, Laws 1918, was enacted imposing precisely the same obligation in favor of materialmen on public work—the validity of which appellant here concedes.

Compare *Commercial Bank* v. *Evans*, 145 Miss. 643, 112 So. 482, where the Court said:

> "The statute wrote into Owen's bond the condition it required to be in there. The statute is mandatory. The obligor and the obligee, as well as the sureties on the bond are presumed to have known what the statute requires when the bond was executed. The bond having been executed, and having accomplished its purpose, the law will write into the bond what it requires should be written. In other words, in the execution of a bond by a contractor to do public work, so far as the condition of the bond is concerned, the law takes care of that, and makes it what it should be."

The case from which the foregoing quotation is taken, of course, dealt with a bond for public work.

See *McElrath* v. *Kimmons*, 146 Miss. 775, 112 So. 164; *Stowell* v. *Clark*, 152 Miss. 32, 118 So. 370.

In *Standard Oil Co.* v. *National Surety Co.*, 143 Miss. 841, 107 So. 559, Mr. Chief Justice Smith said:

> "It is true that the bond here in question does not provide on its face that the Clark-Hunt Contracting Company shall promptly make payment to all persons supplying labor or materials for the work to be done for the drainage district, *but it does expressly provide for the performance by the Clark Hunt Contracting Company of all 'the matters and things' contained, set out, or referred to in its contract* with the drainage district, one of which is that it 'shall discharge all claims for work done and materials furnished in the prosecution of the work', and shall furnish the drain-

age district with evidence that 'all persons who have done work or furnished material under this contract have been fully paid for such work or material.' *The performance of this stipulation of the contract is, therefore, one of the obligations of the bond executed by the Clark-Hunt Construction Company to insure the performance by it of its contract.* The statute does not require the obligation that such contractor shall promptly make payment, etc., to be written in the bond. It simply requires such payments to be one of the obligations of the bond." (Italics ours.)

So when the bond here sued upon was thus executed, *making reference specifically to the obligations required by the contract documents,* under this decision, these contractual obligations were integrated into the bond as definitely as if there placed at length. Insofar as a paid surety is concerned there is, by counsel's concession of the validity of such a law as to public contracts, an end of this litigation; for the paid surety, as to the rights of subcontractors in each case, from a constitutional viewpoint, occupy precisely the same position.

Further, this statute has been in effect nearly 15 years and has been so frequently enforced in Mississippi as to make a conscious disregard thereof by a contracting insurance company an impossibility, especially, when it came to fixing the premium, Point I, supra.

As above pointed out, by Section 30 of Specifications, No. 333, Tr. 16-17), dealing with the obligation of contractors and subcontractors, it was declared that he should

"pay the cost of any required recordation of the contract and bond and the cost of any required cancellation of the same. *He shall also secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract.*"

"The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with

> plans and specifications; it shall protect the Owner against all liens or claims that may be filed against the building according to the Laws of the State of Mississippi, and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary" (No. 333, Tr. 22). (Italics ours.)

Of course the Louisiana Statute, as law, had no extra-territorial effect, but privileges, as such, concursus proceedings, as such, and recordation, both of the bond and the contract, especially to "secure and pay for lien and privilege certificate * * * before final payment * * * under this contract," imported, *by agreement* of the surety, that obligation imposed by law in Louisiana, which in Mississippi became a contractual obligation. Thereasto, Act No. 298, Laws of 1926, of Lousiana, specifically provided by Section 2 that the owner was required to have a good and solvent surety and "the bond shall be attached to and recorded with the contract", providing therefor.

Section 3 of said Act No. 298 provides:

> "Where the owner has required the bond herein provided, the said surety thereon shall be liable *in solido* with the contractor for all labor and materials used in said work of improvements and the cost of recording valid liens up to the amount of the bond, and the cancellation and erasure of the inscription of said contract, as hereinabove provided, shall not effect the liability of the surety on said contract for such labor and materials, as to which labor and material said surety shall be bound to the same extent as the said contractor, undertaker, master-mechanic, or engineer, or other person undertaking such work."

Again, by Section 6, of said Act No. 298, in case of an insufficient bond, the owner was personally liable.

Under Section 8 of said Act No. 298—

> "A building contract may provide for partial payments as the work progresses and any payment made by the owner strictly in accordance with the contract shall absolve him from further liability, provided that he has exacted the bond and has recorded the contract and bond as required by this act."

Under Section 10 of said Act No. 298 the concursus proceedings are provided for and thereunder the attorney's fee is fixed, but thereasto the subcontractors are given preference, it being provided:

> "Any surety so desiring may invoke the concursus proceedings herein authorized by proper proceeding in court and by depositing in court at the time of the filing of the proceeding the full amount of the bond, provided that after the case is at issue such surety may withdraw with the permission of the court all of the deposit made except sufficient to cover the claims made in the concursus and twenty-five per cent additional thereto."

So, when appellant, a paid surety, had this contract executed in Mississippi, imported from Louisiana, he was well acquainted with that thereunder required, and this Section 30 (No. 333, Tr. 17), in addition to the unanswerable position taken by our own Supreme Court, and pointed out in our Motion to dismiss this appeal, demonstrating that appellant knew the possible liability, and knowing, contracted with reference thereto.

Therefore, that here in issue is Section 3 of said Act (Mississippi Code of 1930, 2276), whereunder:

> "In the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract,

the same as if such stipulation had been incorporated in said bond,"

namely, a provision,

"for the payment of the claims of persons furnishing labor or material."

Point III.

Said Chapter 128, Laws of Mississippi, 1918 (Secs. 2274-2281, Code 1930), does not violate the Federal Constitution.

In *Parsons* v. *U. S. F. & G. Co.*, 112 So. 469, 147 Miss. 335, McGowan, J., reviewed the decisions, saying:

"Counsel for appellant really bases his contention that the statute is unconstitutional upon the theory that section 3 of the act (chapter 128, Laws of Mississippi of 1918), abridges liberty of contract, and cites *Gibbs* v. *Tally*, 133 Cal. 373, 65 P. 970, and the cases from that court which follow it, to-wit, *Shaughnessy* v. *American Surety Co.*, 138 Cal. 543, 69 P. 250, 71 P. 701; *Montague & Co.* v. *Furness*, 145 Cal. 205, 78 P. 640; *San Francisco Lumber Co.* v. *Bibb*, 139 Cal. 192, 72 P. 964; id., 139 Cal. 325, 73 P. 864; *Equitable Life Ins. Co.* v. *Stemmons* (Tex. Civ. App.), 239 S. W. 1039; and he also relies on *Hess* v. *Denman Co.* (Tex. Civ. App.), 218 S. W. 162, from the Texas Court.

"The *Gibb* v. *Tally Case, supra*, is the leading case relied upon and urged by counsel for the position that the act here in question is unconstitutional. In that case there was a claim of materialmen against the owner. The statute applied alike to the contractor and owner. The court said that it compelled the *owner to become responsible for a liability he had not incurred*, and *which was not for his benefit;* that it practically forbade him from improving his property by letting a contract unless he became liable therefor or furnished sureties who would be so liable.

"The California statute above cited required that the contract, if not filed, was void, and the effect of the

statute was to make the contractor the agent of the owner. Counsel says this California statute is very similar to ours, but we are unable to trace any essential similarity, save that it requires a bond to be taken, whereas our statute permits a bond to be taken by the owner.

"The statute we have under review does not require the owner to protect himself with a bond. It only provides that, if he takes bond, having put all the stipulations in the contract he desires, that the bond must inure to the benefit of the laborers and materialmen, not in violation of the obligee's rights, but subservient thereto, and we are unable to perceive that the requiring of this stipulation in this bond is other than for the benefit of the owner and requires the contractor to do that which *he was legally and morally required to do, pay his debts, and the surety, with the law staring him in the face, may or may not thus undertake the indemnity of his principal, for the surety's right to contract is not impaired nor is his liberty to contract abridged or interfered with.*

"In the case of *Hess* v. *Denman Lumber Co.* (Tex. Civ. App.), 218 S. W. 162, a Texas statute providing for and requiring a bond to be taken by the owner from a contractor to secure performance of a building contract was declared unconstitutional, the court saying, in effect, in that case, that the provisions of the Revised Statute of 1911, art. 5623, as amended by Acts 1915, c. 143, requiring owner to contract with builder to give a bond conditioned as required by article 5623*a* as added by Acts of 1915, c. 143, was held void, being an interference with constitutional liberty of contract. Said Statute specifically provided that the owner shall cause to be executed a written contract for the erection, etc., and shall also cause to be executed and filed with the county clerk, before the work is begun, a good and sufficient bond, and further provides that said bond shall inure to the benefit of materialmen, laborers, and the subcontractor, regardless of whether or not they are secured by any lien. The court said:

" 'But the law requires the owner to contract with the contractor to give a bond. It is compulsory contract purely. We think that it is beyond the power of the Legislature to require an owner to contract with the contractor to give a bond, as done in this very act, because it is interference with the law of the liberty of contract.. If the owner does contract to have the contractor give a bond, he is at liberty to do so as a subject-matter of contract; but if the owner does not so contract, a personal judgment cannot be rendered against him for not requiring the bond of the contractor.'

"It will be observed that this opinion is from the Court of Civil Appeals of Texas, Texarkana, and in the case of *Equitable Insurance Co.* v. *Stemmons,* 239 S. W. 1039, the Supreme Court of Texas denied a writ of error to the Court of Civil Appeals, which had followed the Texarkana court in *Hess* v. *Denman* in holding that the statute requiring the owner of the property to execute a bond was unconstitutional, and the declination by that court of the writ of error was tantamount to the approval of the decision rendered by the Court of Appeals in *Hess* v. *Denman, supra,* that the statute was void.

"The obvious distinction between our statute, section 3, and the Texas statute is that our statute does not undertake, in anywise, to require the owner to demand and receive a bond for the performance of his contract, so that we do not think the Texas cases are authority upon which we could rely in this case.

"On the other hand, the weight of authority sustains the validity of this statute. In the case of *Roystone* v. *Darling,* 171 Cal. 526, 154 P. 15, an act, very much more similar to ours than the one considered in the Tally Case, was very vigorously challenged and held to be constitutional by the California court, with the Tally Case, the Shaughnessy Case, and the other cases following the Tally Case in mind, and with express reference thereto, and the statute of 1911, con-

sidered in the Roystone Case, contained a provision for a bond to be furnished by the contractor to the owner. The Court, speaking of this latter statute, says:

" 'The law of 1911 here involved does not deprive the owner of the right to contract for the improvement of his property. It allows him to contract freely for such improvement and upon such terms as he may deem for his best interests. All it exacts from him, as a condition of such exemption from liability, and in order to make his contract effective, is that he shall provide a reasonable security for the constitutional lien given for labor and materials furnished to his contractor. It is not an unreasonable burden. It is one which we think the people have the power to impose and which we believe to be within the scope of the constitutional mandate in the section conferring such liens, and of the police power. * * *

" 'We are unable to perceive any constitutional objection to the expedient of providing that by the execution and filing of such bond the owner may be protected against the delinquencies of his contractor while, at the same time, lien claimants are afforded a security for the payment of their claims. We therefore hold that the foregoing decisions are not applicable, and that the provision for requiring this bond is not unconstitutional or invalid.'

"So that, the last utterance from the California court would be authority for upholding the constitutionality of this act, upon a statute more clearly like ours than the one declared unconstitutional in the Tally case.

"Our investigation leads us to the conclusion that most of the appellate courts of this country, including the Supreme Court of the United States, have held that the *liens granted by the Legislature to subcontractors, mechanics, and materialmen, upon the land of the owner, are valid although the owner had no contractual relations with this class, and we think these*

are persuasive to sustain us in our view that the classification of mechanics, materialmen, and laborers as a class to be favored by the Legislature is not an arbitrary classification, but is reasonable, and has for its object the welfare of the country at large, and quite generally recognized as valid. Especially is that true when we consider that on every hand by the thousands these contracts are multiplying, and such a vast number of our citizens are engaged as subcontractors, materialmen, and mechanics, and this class has been greatly augmented within the past decade. And especially is this true of our own state, where the sovereign itself is engaged in greater building enterprises than, perhaps, ever before in any one period, and from every hamlet, city, and town there comes the ring of the anvil, the tap of the hammer, and the music of the saw, as they vie with each other in general construction and improvement work.

"Building and construction is an essential under modern progressive conditions to the maintenance of commerce. Credit is an essential here in this line of endeavor as in other avenues of commerce. If the master workman or contractor were not assured of credit, then the surety would be called on in many instances to extend the credit so necessary to continued progressive movement or else complete the contract.

"A review of the authorities on the validity of the mechanics' and materialmen's lien would seem to be unnecessary. The essence of these decisions is to the effect, first, that the labor and material used in building are for the direct benefit of the owner for which the property improved should be liable; second, that he is presumed to contract with full knowledge of the law, and he has the power to protect himself against loss by safeguarding the fund necessary to pay for labor and materials. These expressions of the courts generally answer every attack made upon the constitutionality of these laws respecting a lien upon the land of the owner. It is difficult to differentiate a

statute giving a lien on property of the owner and a statute providing that the owner may, if he sees proper, take security by requiring a bond for the faithful performance of the contract, and that when such bond is taken (he may take it or not as he pleases), such bond shall stand as security for the payment of the materialmen and mechanics and an action be brought thereon inuring to the benefit of this class.

"In the case of *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532, 24 S. Ct. 577, 48 L. Ed. 778, the Supreme Court of the United States held that liberty of contract is not unreasonably interfered with, nor is property taken without due process of law, by the provisions of Ohio Rev. Stat. Sections 3184, 3185, and 3185a, giving a lien on the property of the owner to subcontractors, laborers, and those who furnish materials to be used by the contractor in the execution of his contract with the owner; and this, too, at a time when the Supreme Court of the United States was advised that the Ohio Supreme Court had declared these statutes to be invalid and unconstitutional. The Court devoted but little space to that question, but expressly approved the opinion of the Circuit Court of Appeals in the case then under review and *the opinion written by Judge Lurton, who cogently stated the reasons in support of the constitutionality of this statute, and cited Jones* v. *Great Southern Fireproof Hotel Co.*, 86 F. 371, 30 C. C. A. 108. We also cite that case as being in favor of the constitutionality of the statute here under review, there being no such interference with 'liberty of contract' contemplated by the Fourteenth Amendment in the statute here under review as to warrant this court in declaring it invalid. The reasoning and logic in support of the mechanics' lien statute is just as strong, just as cogent, just as powerful, and just as applicable to the statute here requiring that if a bond be taken by the owner to secure performance of the building contract that it shall contain a stipulation

protecting the materialmen and laborers subordinate to the rights of the obligee in the bond.

"The case most nearly in point is that of *Rio Grande Lumber Co.* v. *Darke*, 50 Utah 114, 167 P. 241, L. A. A. 1918 A, 1193. Passing upon the validity of the Utah Statute which requires the property owner when contracting for the erection of a building to take a bond to himself for the benefit of every person interested, and the Supreme Court of Utah stated that it was unable to find any reason for declaring the statute in question unconstitutional, they reviewed at length the California cases, and, quoting from the main California case, the Utah court said:

" 'The statute does not say who shall cause this bond to be executed, nor to whom it shall, in form, be made payable. It does not undertake that the contractor shall faithfully perform his contract. In short, there is in it nothing which can be of advantage to the owner in any possible event.

"And the Utah court proceeds, to say, in effect, that the points made in the above quotation constitute the principal objection of the California court to the statute, and called attention to the fact that no portion of the above criticism could be justly applied to the Utah statutes. The court discussed the *Roystone Case*, a later California case, and, after comparing and conceding the analogy between the materialmen's statute and the bond statute, the court comes to a conclusion in the following language:

" 'The bond, as in this case, is conditioned for the faithful performance of the contract and securing the payment of laborers and materialmen. If the owner requires the contractor to procure the statutory bond, he is protected against loss. If he does not, he becomes liable to laborers and materialmen if the contractor fails to pay them, even though he may have paid the contractor in full. He has his remedy in his own hands. Under the Mechanic's Lien Law, if he fails to hold the fund for the payment of laborers and materialmen, the same misfortune may occur. To use

the epigrammatic expression of respondent's brief: 'Under the bond statute he must take care to exact the bond, and under the lien statute he must take care to hold the fund.' We are unable to find any reason for declaring the statute in question unconstitutional. Certainly, to say the least, reasonable doubts as to its constitutionality, after thoroughly considering the question, are such as to render it the imperative duty of the court to declare the statute valid as against the objections made. It is ordered by the court that the judgment be affirmed.'

"When we consider that in the instant case this last-mentioned rule of construction must control where the constitutionality or validity of the statute is involved, then it is just as binding upon us as any other rule; and after fully and fairly considering the powers of legislative bodies, and the limitation of their power under the Constitution, if there is a reasonable doubt in the mind of the court, then that doubt must be cast in favor of the validity of the act."

And citing to approve *Ogden* v. *Saunders,* 12 Wheat. 213, 6 L. Ed. 606.

The only case cited by opposite counsel not specifically reviewed in *Parsons* v. *U. S. F. & G. Co.,* 112 So. 469, 147 Miss. 335, *supra,* is *Kelly* v. *Johnson,* 251 Ill. 135, 95 N. E. 1068, 36 L. R. A. (N. S.) 573; but that decision assumed only to follow a prior decision of Ohio, in *Palmer* v. *Tingle,* 45 Ohio St. 423, 45 N. E. 313; a Michigan case, *Spry Lumber Co.* v. *Murphy,* 148 Pa. St. 337, 23 A. 1134.

Mr. Justice Harlan, in *Great Southern Fire Proof Hotel Co.* v. *Jones,* 193 U. S. 547, 48 L. Ed. 788, dealing with the precise question, said:

"We are constrained to withhold our assent to the views expressed by the Supreme Court of Ohio, and to express our concurrence with the circuit court of appeals. The great weight of authority in this country as to the meaning and scope of constitutional pro-

visions substantially like those to be found in the Constitution of Ohio is, in our opinion, against the conclusion reached by the learned state court. Exercising an independent judgment on the subject, we are obliged to so declare. The reasons in support of the constitutionality of the statute are cogently stated in the able and elaborate opinion of Judge Lurton, speaking for the circuit court of appeals in this case. *Jones* v. *Great Southern Fire Proof Hotel Co.*, 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 371. *As the reports of the decisions of the circuit court of appeals are accessible to all, we will not encumber this opinion with a restatement of the grounds, so fully set forth by that court, on which the validity of the statute must be sustained. We content ourselves with referring to its opinion, and with citing in the margin some authorities which, in our judgment, support the views expressed by the circuit court of appeals. It results that the decree must be affirmed.*" (Italics ours.)

Therefore, dealing with the Federal Constitution—the State Constitution being here eliminated, we have the decision of this Court condemning the reasoning of the Illinois Court as to Section 21 of the Act there involved. The proper rule being declared in the case of *Great Southern Fire Proof Hotel Co.* v. *Jones* 193 U. S. 532, 48 L. Ed. 778, approving an opinion by Mr. Justice Lurton in *Jones* v. *Great Southern Fire Proof Hotel Co.*, 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed., 371, which case, especially the opinion in the Court of Appeals, adopted by this Court, is conclusive of the point here at issue.

After a thorough review of all cognate cases, Judge Lurton, later Mr. Justice Lurton, laid down the theories whereunder this legislation might be constitutional thus:

"In neither of these cases, though the amounts involved were great, was any constitutional objection to the statutes giving the lien suggested, though very emi-

nent counsel appeared in each case. The constitutional validity of statutes giving an independent lien has the support of most of the text writers. 2 Jones, Liens 286; Phil. Mech. Liens, Sec. 30; Boisot, Mech. Liens, Sections 22, 23. Overton on Liens (Section 553) has been cited as advancing a contrary view. If we had doubt as to whether such statute was 'due process of law', or violated the fundamental right of owning and enjoying property, or unreasonably restrained liberty of contract, we should be disposed to yield to the current and weight of authority upholding such acts as valid and constitutional. No court is justified in striking down an act of legislation, unless it is clearly satisfied that the act is in conflict with the organic law limiting the power of the legislative branch of government. Such statutes have met with the approval of the legislative bodies of nearly every state in the Union, as well as of Congress, as indicated by the Act of 1833, construed in *Winder* v. *Caldwell,* 14 How. 434. They have survived assault whenever the question has arisen, save in Ohio and Michigan, and to a limited degree in Pennsylvania, and in a still larger number of instances have been enforced without question as to their validity.

"But the validity of such statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that every one who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation. This strong natural justice has given rise to a variety of liens recognized by the common law. Thus, without any agreement the common law gave to one who, by his labor or expense, has made, preserved, enlarged, or repaired a chattel, a lien thereon for his security, which he may, however, lose if he surrender possession. So we find another illustration in the lien given one who, in the exercise of a quasi public employment, is required to receive or perform some service in respect to the thing upon which

the lien is given. That the owner who sells his chattel shall not be required to part with it until the price is paid rests upon the justice of the matter, and not upon any agreement. But the remedies prescribed by the common law by no means embrace the numberless instances in which the inherent right of the matter requires that a charge or lien should be recognized as arising out of the nature of the transaction, independently of any agreement. That side class of trusts arising out of the conduct of the parties, either with or without intention, but without express words of creation, which we call constructive or implied trusts, rest upon the natural justice which will not permit one to retain that which in justice does not belong to him, and therefore fastens upon the thing or that into which it is traced, a charge or lien in favor of the equitable owner. So, the vendor of realty may ordinarily, without any express agreement, apply the property sold to the payment of the price. There are a large variety of cases where a lien has been recognized as arising out of the nature of the transaction, although there was no direct contractual relation between the parties affected. Thus, in the maritime law the last lien created by the master of a ship for supplies or repairs is entitled to preference over prior liens; the principle being that the common pledge has thereby been preserved for the common benefit. So, he who rescues goods from capture or the perils of the sea has a lien thereon for his compensation. The meritorious character of a claim often displaces prior burdens, as in the case of supplies and labor furnished by a mortgaged railway company to keep it in operation, and preserve the property for the benefit of all interested.

"Whoever takes and holds possession of land to which another has the better title is liable to the true owner for the rents and profits, and no distinction is recognized between a *bona fide* and *mala fide* possession. *Green* v. *Biddle*, 8 Wheat. 1, 74. But this was a harsh rule when applied to a case where the rents and profits had been offset by lasting improvements, which had

actually increased the value of the land. Courts of equity, therefore, soon applied the principle that, where the owner resorted to a court of equity for an account of rents and profits, the permanent improvements should offset the liability of the possessor if his possession and improvements were in good faith. 2 *Story, Eq. Jur.*, Sections 799a, 799b, 1237, 1239.

"In *Bright* v. *Boyd*, 1 Story 478, Fed. Cas. No. 1, 875, and same case in 2 Story 605, Fed. Cas. No. 1, 876, Justice Story laid down the broad doctrine that a *bona fide* purchaser, without notice of defect in his title, who makes improvements upon the estate, has a lien upon the estate for the increased value, after deducting rents and profits; and a court of equity will enforce this lien against the true owner who recovers the estate at law against such a purchaser. This case has been adopted and approved in *Valles' Heirs* v. *Fleming's Heirs*, 29 Mo. 152, *Association* v. *Morrison*, 39 Md. 281, and *Hatcher* v. *Briggs*, 6 Or. 31, though it cannot be said to have received any very general support, though often cited. The reason is doubtless found in the fact that the equities of *bona fide* purchasers of defective titles were so generally recognized as to result in statutes in most of the States, called 'betterment' or 'occupant' statutes, which provide that a *bona fide* occupant making lasting improvements in good faith shall have a lien upon the estate recovered by the true owner to the extent that his improvements have increased the value of the land. Though the operation of these statutes is to make the true owner pay for improvements made against his will, and which he might not desire, the courts have sustained their constitutionality, as giving remedy where before there had been none, though a strong equity existed. *Cooley, Const. Lim.*, 486 *et seq.*; *Brown* v. *Storm*, 4 Vt. 37; *Ross* v. *Irving*, 14 Ill. 171; *Griswold* v. *Bragg*, 48 Fed. 519; *Hunt's Lessee* v. *McMahan*, 5 Ohio, 132; *Scott* v. *Mather*, 14 Tex. 235; *Davis* v. *Powell*, 13 Ohio, 308; *McCoy* v. *Grandy*, 3 Ohio St. 463; *Bacon* v. *Callender*, 6 Mass. 303; *Welch* v. *Wodsworth*, 30 Conn. 149; *Whitney* v. *Richardson*, 31 Vt. 300.

The constitutionality of a similar Tennessee act was denied in *Nelson* v. *Allen,* 1 Yerg. 376, but Chief Justice Catron, in a note says the question did not arise.

"Not only was the equity so broadly declared and enforced by the civil law, but in that system of law very high consideration was given to all who had by their contributions, benefited, preserved, or enlarged the estate or property of another; and, among creditors secured by a common pledge or mortgage, those whose contributions were given and used for the benefit of the thing hypothecated were privileged, and, among this class, those whose contributions were last given and used had the preference. *Macheldy, Rom. Law,* 280, 281.

"Domat says:

" 'Among creditors who are privileged, it does not matter which of them is first or last in order of time, for they are distinguished only by the nature of their privileges.' *Domat Civ. Law* (by Strahon) 681.

"Thus, he who had sold an immovable thing was privileged for the price, before the creditors of the purchaser and all others, as to the thing sold. So, he who loaned money to a purchaser to pay the purchase price had the same privilege as the seller would have had till he had been paid. He who loaned money to preserve the thing, or to make an improvement of an estate, had a like privilege. Id. 682, 683. This equity was, by the civil law, extended to all who had contributed to the preservation, repair, enlargement, or creation of an improvement on land. This privilege is thus stated in Domat (page 683, Section 1744):

" 'Architects and other undertakers, workmen and artificers, who bestow their labor on buildings or other works, and who furnish materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have the same privilege for their salaries, and for what they furnish, as those who have advanced money for these kinds of

works, and which the seller has for the price of the thing sold.'

"None of these instances, from either the civil or common law, or a charge of preference, are dependent upon an express agreement for such privilege over other creditors. They have their basis in the nature of the transaction. Statutes which give to a contractor or materialman, dealing directly with the owner, a lien on the building or land, do so independently of any agreement for a lien, but their validity has never been doubted. Yet the basis for the interposition of a lien is the mere equity in favor of him who, by his labor or materials, has benefited the owner, and has acquired, therefore, an interest in the property benefited, to secure his just compensation. In most instances it is well understood that the contractor will employ others to aid in or do the work and to furnish the materials necessary. The earlier statutes did not extend any protection to those who should be thus employed by the contractor. To remedy this, some statutes gave to such subcontractors, workmen, or furnishers of materials a mere derivative lien, by which they might be substituted to the lien and claim of the contractor. In others an independent lien was given to to all who should, at the instance of the owner or his contractor, contribute towards the completion of the work either labor or materials. Of this character is the Ohio statute under consideration. Such statutes rest upon the principle of natural justice which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner had no direct contractual relations. But, if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who, at the instance of his contractor, shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it cannot be said

to impair the obligation of a contract. If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. 'The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect.' *Edwards* v. *Kearney*, 96 U. S. 595; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Denny* v. *Bennett*, 128 U. S. 489, 9 Sup. Ct. 134; *Smith* v. *Parsons*, 1 Ohio, 236; *Weil* v. *State*, 46 Ohio St. 450, 21 N. E. 643. Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of *law*. *Provident Inst. for Savings* v. *Jersey City*, 113 U. S. 506-514, 5 Sup. Ct. 612.

"If, then, this statute does not unduly restrain the owner's liberty of contract, considered as an incident to the right of owning, possessing and enjoying property, the law must be constitutionally unobjectionable. If, however, this legislation is the mere arbitrary exercise of the powers of government, unauthorized by the established principles of private right, and not having the sanction of natural justice, it is not the law of the land. But we have already seen that the underlying purpose of the act is not to arbitrarily and unnecessarily oppress the owner in any incident of his right as owner, but to secure those who, by their labor or materials, have contributed to the improvement of the owner's property. That the liens under consideration are given to secure debts which are primarily the debts of another would be fatal to the legislation, as taking the property of one to pay the debts of another, but for the equity arising from the use of the labor and

materials by the owner. It is in this connection of the owner with such debts that the justice of the statute is found. In paying off such claims, the owner may, if he exercise proper precaution, pay only his own debt to the contractor. If he be required to pay such subcontractors when nothing is due the principal contractor, it is his own fault. That the liability of the owner in respect to building contracts is restrained in some degree by this statute must be admitted. If he pay in advance, or contract to pay in property, or by an exchange of paper, and his contractor be dishonest or insolvent, he may find himself involved by the contractor's debts for labor or supplies. This contingency he may not always be able to guard against. But as much may be said of those who furnish labor or material at the instance of the contractor. Without the lien they must look alone to the contractor, and may not always be able to protect themselves. Inasmuch as the owner actually gets the benefit of their contributions to his property, their equity is a strong one, and the legislature has, in its discretion, determined to cast upon the owner the responsibility of guarding against the defaults of a contractor selected by himself. To protect the class having this equity, the making of building contracts has been regulated. The restraints upon the owner are neither arbitrary nor oppressive; nor are they, under this Ohio statute, any more onerous than required by the necessity of protecting those who actually do the work or furnish the materials by which the owner is benefited. To permit such persons to follow and recover their contributions in kind would be futile to them, and disastrous to the owner. A law which has for its basis equitable principles, which in all times and in all ages have had recognition, cannot be arbitrary and oppressive to the straints upon liberty of contract are constantly met with in the legislation of every state. Statutes requiring certain contracts to be in writing or to be witnessed or acknowledged or registered, statutes regulating interest or the time within which rights may be enforced, and statutes ex-

empting property from liability to execution, are notable examples of statutes regulating and limiting contracts. No more striking example of interference with liberty of contracts is afforded than the statute upheld by the Ohio Court in *Weil* v. *State,* 46 Ohio St. 450, 21 N. E. 643. The statute there declared valid was one which regulated conditional sales of personal property, or sales upon the installment plan, and made the violation of one of its sections a misdemeanor.

"The equity in favor of those to whom the benefit of the Ohio lien law is extended is in its nature comparable to many equities recognized by courts of chancery and in other systems of law. But it was an equity upon which there was no remedy. The statute gives one in respect to future contracts. We cannot say that the remedy is so arbitrary or oppressive, or so unreasonable, as to be an act in excess of legislative power. The right of him who, by his labor and materials, had contributed to the betterment of another's estate, was an imperfect right, because it had not been done at the instance of the owner, though presumably with his knowledge and at the instance of his contractor. At the common law neither the owner nor his building was chargeable, there being no contractual relation. The statute recognizes the equity of such contributors, and has turned the imperfect into a perfect right, by prescribing the consequences of a building contract, and giving a remedy to all who, at the instance of the contractor, shall contribute to the performance of his contract with the owner. That legislation which is sanctioned by the dictates of natural justice can only be avoided by pointing out some specific provision in the organic law which has been violated by its enactment. Neither upon reason nor authority are we able to come to an agreement with the Ohio court. In the exercise of our independent constitutional jurisdiction, we must declare our conscientious judgment to be that the Ohio statute was not void, and that complaints are entitled to relief thereunder. The decree of the circuit court must be reversed. The

demurrer will be overruled, and the cause remanded for answer and further proceedings not inconsistent with this opinion."

This reasoning has the approval of this Court, and this case not adverted to by opposite counsel is conclusive of the validity of that hereunder assailed.

Where, as here, there is to be the placing by materialmen of their goods upon the land of another, at a contractor's instance, the law has almost universally stepped in and prescribed rights to materialmen.

Dealing with the alleged liberty of contract, this Court in *Hardware Dealers, etc., Co.* v. *Glidden*, U. S. Supreme Court Advance Opinions No. 3, page 65, October Term, 1931, said:

> "Without stopping to examine these contentions, we assume that appellant's freedom of contract was restricted by operation of the statute, and pass directly to the question decided by the State court, whether the Fourteenth Amendment precludes the exercise of such compulsion by the legislative power.
>
> "The right to make contracts embraced in the concept of liberty guaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 567. Hence, legislation otherwise within the scope of acknowledged state power, and unreasonably or arbitrarily exercised, can not be condemned because it curtails the power of the individual to contract. *McLean* v. *Arkansas*, 211 U. S. 539; *Schmidinger* v. *Chicago*, 226 U. S. 578; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389; *Erie R. R.* v. *Williams*, 233 U. S. 685; *Keokee Cons. Coke Co.* v. *Taylor*, 234 U. S. 224.

Further, he said:

"The records and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation, but as it deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged. *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; see *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392, 397. We cannot assume that the Minnesota Legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded.

"Without the aid of the presumption, we know that the arbitration clause has long been voluntarily inserted by insurers in fire policies, and we share in the common knowledge that the amount of loss is a fruitful and often the only subject of controversy between insured and insurer; that speedy determination of the policy liability such as may be secured by arbitration of this issue is a matter of wide concern. See *Fidelity Mut. Life Ins. Co.* v. *Mettler*, 185 U. S. 308; *Farmers' & Merchants Ins. Co.* v. *Dobney*, 189 U. S. 301; that in the appraisal of the loss by arbitration expert knowledge and prompt inspection of the damaged property may be availed of to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding.

"These considerations are sufficient to support the exercise of the legislative judgment in requiring a more summary method of determining the amount of the loss than that afforded by traditional forms. Hence the requirement that disputes of this type arising under this special class of insurance contracts be submitted to arbitrators cannot be deemed to be a

denial of either due process or equal protection of the laws."

This statute has been in effect in Mississippi since 1918, and has been integrated consistently into the obligations assumed by these companies in their dealings with the public, and when, as here, in order to obtain for Burkes, the contractor, the right to assign, transfer or otherwise dispose of, in any way, the contract or the proceeds thereof, to the detriment or prejudice of the subcontractors and materialmen, and to discharge the equity against the owner, *Dickson* v. *U. S. F. & G. Co., infra,* this bond was executed, the surety thereon having, under our decisions, vouchsafed to Burkes this right to assign to the New Orleans Bank, may not, having thus obtained from Burkes this right, now assert that thereby this right did not so thus exist.

The holding of the Supreme Court of Mississippi under Section 3, Chapter 128, Laws of Miss. 1918, is, that when the owner and/or materialmen are deprived of the rights given by Section 2, which are conceded to be valid, that therefor and thereunder, Section 3 makes such bond so thus given, available. By such holding there is no deprivation of property without due process.

In considering this cause on the first appeal, on demurrer, the Supreme Court of the State of Mississippi in *Hartford Accident & Indemnity Company* v. *Natchez Investment Company, Inc., et al.,* 155 Miss. 31, 119 So. 366, page 369, held:

" * * * Section 2 of the Act is challenged as impairing the right of a contractor to make contracts and to receive the price therefor, and dispose of it, as he sees proper, as a necessary incident to the protection of his business. Of course the Section does not prohibit the subcontractors, journeymen, laborers and materialmen from waiving such right or entering into

contracts by which such rights are waived or otherwise provided for, but it does give rights to the subcontractors, journeymen, and laborers and materialmen against the funds due the principal contractor for the protection of their contracts with him, and in furnishing labor and material in carrying out his contract. The Legislature has the power to regulate the right of contract in a reasonable manner, so long as the right to contract is not destroyed or seriously impaired. The effect of the statute before us in the case named is similar to impounding money due to one person by a process of garnishment to the satisfaction of the claims of another person against the owner of such funds, and it has always been, as we understand it, permissible for the Legislature to provide remedies to parties furnishing labor and material, or in selling property, by providing liens or other proceedings impounding the property or its proceeds."

As reasoned by the court, the Legislature, having created a lien on right to lien in favor of materialmen and subcontractors, as it had a right to do, the Legislature then proceeded in Section 3 of the Act to provide for the benefit of the principal contractor a means and method by which the principal contractor could release and obtain the discharge of the proceeds of his contract from the effects of that lien.

The Act does not require the owner of the building, the contractor, or any surety to enter into and make the bond provided for in Section 3 of the Act, but does provide that if a bond be given, conditioned to guarantee the faithful performance of the contract, then, in that event, and under those conditions, the lien and lien rights of subcontractors and materialmen are discharged; but in the place of such lien or lien rights the subcontractors and materialmen are given another remedy for the enforcement of the payment to them for material and labor which have gone into the construction of the building, and, being so incorporated in

the building, cannot be taken or otherwise charged with any other lien or lien right.

The bond being given, the subcontractors and materialmen are, willy-nilly, deprived of the substantial and substantive right conferred upon them by Sections 1 and 2 of the Act, and, the bond being given, such subcontractors and materialmen cannot complain of any disposition that may be made by the principal contractor of any of the proceeds of his contract. This being so, a surety who enters into a bond under the provisions of Section 3 of the Act of its own volition and by the terms of the Act incorporated into its contract, takes from subcontractors and materialmen those substantive rights conferred by Sections 1 and 2 of the Act and offers its own faith and credit to the subcontractors and materialmen in lieu thereof.

Therefore, as the Mississippi Supreme Court has held in this and other cases, Section 3 of the Act is not constitutional, because the Act first does not require the bond to be given in any event, and secondly, does not deprive any contracting party of the right to incorporate in the contract and bond such conditions and provisions as it may see proper—subject, however, to the one condition that, of course, there may not be incorporated in the bond such conditions, terms and provisions as would nullify the bond as to the rights of subcontractors, laborers and materialmen. Thus to do would be to enable the contractor and surety to gain the advantage of releasing the proceeds of the contract from the effects of Sections 1 and 2 of the Act without in turn conferring upon subcontractors and materialmen the benefits of Section 3 of the Act.

> "The regulations of corporations for the public interest under the police power are valid whether the power to alter the charter has been reserved or not."
> (*Troy, etc., R. Co.* v. *Kerr*, 17 Barb. (N. Y. 1854) 581.)

Very stringent regulations of insurance companies have been supported under the police power, although in such case the court relied on the theory that, since the insurance company might have been excluded entirely, it could be allowed to write contracts only on such terms as the State might impose, even though they contained an element of hardship.

> "Thus the State may require a deposit of securities (*Paul* v. *Virginia*, 8 Wallace (U. S. 1869), 19 L. Ed. 357); may force them to comply with the State laws in detail (*Hooper* v. *People*, 155 U. S. 648, 39 L. Ed. 297); may compel them to settle on the basis of the value of the policy rather than on the actual loss (*Orient Ins. Co.* v. *Dagga*, 172 U. S. 557, 43 L. Ed. 552); may make policies valid even if erroneous answers were given, if not fraudulently given (*John Hancock Life Ins. Co.* v. *Warren*, 181 U. S. 73, 45 L. Ed. 755; *Northwestern Mutual Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 51 L. Ed. 168); can regulate the forfeiture of policies for the non-payment of premiums (*N. Y. Life Ins. Co.* v. *Cramer*, 178 U. S. 389, 44 L. Ed. 1116); and can compel an insurance company to file a certificate before contracts (*Commonwealth* v. *Hock Age Mutual Benefit Association*, 31 Leg. Int. 245, 10 Phila. 554. See, also, *Eagle Ins. Co.* v. *Ohio*, 153 U. S. 446, 38 L. Ed. 779.)"

The statute in question can be further upheld for the reason that it is designed to prevent fraud.

The basis of this law was laid down by the Federal courts wherein it was decided that the State could compel foreign corporations to deposit securities before doing business within the State. (See *Paul* v. *Virginia*, 8 Wallace 168, 19 L. Ed. 357; *Hooper* v. *California*, 155 U. S. 648, 39 L. Ed. 297.)

Under the same principle residents of a State may have priority in cases of insolvency and the due process of law

clause is not thereby violated, although the benefits and immunities of citizens of the United States are thereby abridged. (See *Blake* v. *McClung*, 172 U. S. 239 at 260, 261, 43 L. Ed. 432; *Seely* v. *American National Bank*, 178 U. S. 289; *McGoon* v. *Scales*, 9 Wall. 23, 19 L. Ed. 545; *Frowert* v. *Blank*, 205 Pa. 299, 54 Atl. 1000.)

So, too, it has been upheld that the Legislature has ample power to prevent fraud by police regulations in the matter of blue sky laws. (*Hall* v. *Geiger Jones Co.*, 242 U. S. 539, 61 L. Ed. 480; *Caldwell* v. *Sioux Falls Stock Yards*, 242 U. S. 559, 61 L. Ed. 493; *Merrick* v. *Halsey*, 242 U. S. 568, 61 L. Ed. 498.)

As stated and dealt with in Mott in his "Due Process of Law"—Bobbs-Merrill Company, Publishers (1926)—the courts will sanction legislative interference with private rights when there is a fair balance between the advantage which the public will derive from the statute and the degree of interference with private rights which it involves.

Where the degree of interference is slight the courts, with unerring uniformity, will uphold the law as beneficial to the public, so where there was merely created a State fund which was held as a protection to the public against bankruptcy, etc., the Supreme Court of the United States has pointed out that all that was taken was the use of the money for a short time, a consideration which was negligible in view of the great public convenience. (*Sinking Fund* cases, 99 U. S. 700 at 721, 25 L. Ed. 496; *Thornton* v. *Duffy*, 254 U. S. 361, 65 L. Ed. 304.)

In the instant case the Legislature of Mississippi has seen fit to enact the legislation here under attack, and it was more familiar with the facts and circumstances which surround the subject of bonds and building contracts and with the necessities and occasion of the enactment of the laws in question than can one be who is a stranger to the circumstances and facts surrounding building operations in this

State under the law previous to the enactment of the legislation in 1918.

As held in *Falbrook Irrigation District* v. *Bradley,* 164 U. S. 112 at 160, 41 L. Ed. 369, this legislative determination of issues in question concerning legitimacy of the legislative object will not be disturbed by the Court unless there has been a great abuse, and such determination goes beyond all reason.

> "The people of California and the members of her Legislature must, in the nature of things, be more familiar with the facts and circumstances which surround the subject, and with the necessities and occasion for the irrigation of the lands, than can anyone be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the State courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own State.
>
> "For these reasons, while not regarding the matter as concluded by these various decisions, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thoughts of the court of that State on this question."
>
> *Falbrook Irrigation District* v. *Bradley, supra.*

So, too, it has been held that the Legislature, in determining upon the passage of a law, may make investigations which the court cannot. (*People* v. *Smith,* 108 Mich. 527, 66 N. W. 382; *Morris* v. *Columbus,* 102 Ga. 792, 30 S. E. 850; *State* v. *Main,* 69 Conn. 123, 37 Atl. 86.) A reading of the cases as pointed out by Mott in his work, *supra,* is to the effect that, during the second decade of the nineteenth century, the courts concluded that if they were to properly judge the validity of the legislative object they must have some means of knowing the facts in the situation. Frequently these facts were local, and for the courts to have an understanding of local situations was almost impossible.

For that reason this Court refused to go behind the legislative determination of pool hall regulations in the year 1912 in the case of *Murphy* v. *California*, 225 U. S. 623, 56 L. Ed. 1229, the Court holding that where the statute prohibited pool halls this Court would refuse to take up the question of whether pool halls were detrimental to public morals and that that was for the Legislature to decide and that this Court cannot go behind their findings and inquire into local conditions.

And, again, this Court refused to go into the question of regulation of competition to prevent unfair practices where the statute had prohibited sales at one place at a lower figure than at another where the purpose was to drive out competitors. (*Superior Lamber Co.* v. *South Dakota*, 226 U. S. 157, 57 L. Ed. 164.)

Shortly thereafter, this Court laid down the doctrine that the burden of proof rests upon those who attack the validity of the object of a statute, declaring that,

> "The burden is on him who attacks the legislation and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that public welfare is not subserved by the legislation." (*Erie* v. *Williams*, 233 U. S. (1914) 685 at 699, 58 L. Ed. 1155.)
>
> "Where the legislation has usage to support its position it is much stronger." (*People ex rel.* v. *Murry*, 149 N. Y. 367 at 376, 44 N. E. 146; *People* v. *Schweiner*, 214 N. Y. 395, 108 N. E. 639.)

In Mississippi the Legislature had knowledge as to the abuses which had gone on in the building trade and in the matter of the deprivation of rights of laborers and materialmen in the assigning of the contract price by the chief contractor.

These abuses were corrected by the Legislature in the legislation here under attack and the public need will be presumed by this Court, and the frauds which heretofore ran rampant throughout the State were blocked by the legislation now being sought to be overthrown.

Mr. Justice Clark affirmed the doctrine in the Chicago Billboard case when he declared that the courts were disposed to favor the validity of laws relating to matters completely within the territory of the State enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the high court of the State (*Thomas Cusack* v. *Chicago*, 242 U. S. 526, 61 L. Ed. 472.)

The doctrine was again affirmed in *Hutchinson Ice Cream Company* v. *State*, 242 U. S. 153, 61 L. Ed. 217.

And again in the *Queens Gas Company* case, wherein the court refused to review the facts, or even the reasonableness of an administrative order (*N. Y. ex rel. McCall*, 245 U. S. 345, 62 L. Ed. 337).

The same principle was reaffirmed by this Court by Mr. Justice Day in the municipal fuel yard case, *Jones* v. *Portland*, 245 U. S. 217 at 221, 62 L. Ed. 252, wherein he as the organ of the Court said:

> "While the ultimate authority to determine the validity of legislation under the 14th Amendment is rested in this Court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information."

Mr. Justice McKenna rested the case of *Bunting* v. *Oregon* in no small degree on the same principles (242 U. S. 426, 61 L. Ed. 830).

Mr. Justice Holmes in the case of *Hebe Co.* v. *Shaw*, 248 U. S. 297, 63 L. Ed. 256, said:

> "If the character or effect of the article so intended to be used be debatable, the Legislature is entitled to its own judgment and that judgment is not to be superseded by the verdict of a jury, or, we may add, by the personal opinion of the judges, upon the issue which the Legislature has decided."

The same proposition formed the chief justification given by Mr. Justice Day in upholding the non-partisan legislation of North Dakota, wherein the Court says:

> "What was or was not a public use was a question concerning which local authorities, legislative and judicial, had special means of securing information to enable them to form a judgment; and particularly that the judgment of the highest court of the State, declaring a given use to be public in its nature, would be accepted by this Court *unless clearly unfounded*" (*Green* v. *Frazier*, 253 U. S. 233 at 242, 64 L. Ed. 878).

It, therefore, must be concluded, that if presumption is to be engaged in to support the law and only clear and undemonstrated usurpation of power will authorize police interference with legislative action (*Green* v. *Frazier*, 253 U. S. 233, 64 L. Ed. 878). Other cases in which the courts have deferred to the Legislature are: *Dominion Hotel Co.* v. *Ontario*, 249 U. S. 266, 62 L. Ed. 597 (Mr. Justice Holmes declared the 14th Amendment is not a pedagogical requirement of the impracticable, page 268); *U. S.* v. *Standard Brewery*, 251 U. S. 210, 64 L. Ed. 2[illegible]; *State* v. *Cantwell*, 179 Mo. 245, 78 S. W. 569, affirming *Cantwell* v. *Mo.*, 199 U. S. 602, 50 L. Ed. 329; *N. Y. ex rel.* v. *Hesterberg*, 211 U. S. 31, 53 L. Ed. 75; *Parrott* v. *Benson*, 114 Wash. 116, 194 Pac. 986; *State* v. *Pitney*, 79 Wash. 608 at 612, 140 Pac. 918; *Securities Savings Bank* v. *California*, 263 U. S. 282, 68 L. Ed. 301.

As pointed out in *Williams* v. *Riley*, 280 U. S. 78, 80, 74 L. Ed. 175, 178:

> "The Federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the Federal or state Constitution. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.'"

Ohio Oil Co. v. *Conway*, 281 U. S. 46, 74 L. Ed. 775; *White* v. *Johnson*, 282 U. S. 367, 75 L. Ed. 388; *American Bond & Mortgage Co.* v. *United States*, 282 U. S. 374, 75 L. Ed. 395; and as pointed out, constitutional objections to a statute, which may exist if given a wider application than it is necessary to give in the decision of this particular case, is not open to consideration herein. *Young Co.* v. *McNeal-Edwards Co.*, 283 U. S. 398, 75 L. Ed. 1140. As pointed out in *State Board of Tax Comrs.* v. *Jackson*, 283 U. S. 527, 75 L. Ed. 1248, the fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction or if any state of facts reasonably can be conceived to sustain it. Here, with the receipt by the appellant of appellee's property, donated to perform its contract, appellant may not, having that property now in its possession, refuse to pay the reasonable value thereof. The fact that the statute may work a peculiar personal hardship does not render it unconstitutional. *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 75 L. Ed. 482. That the State, in the matter of protecting materialmen, has a broad discretion in the exercise of its power of regulation must be admitted. *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264.

In *O'Gorman* v. *Hartford Fire Ins. Co.*, 282 U. S. 257, 75 L. Ed. 327, the Court declared:

"The business of insurance is so far affected with a public interest that the state may regulate the rates (*German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915C, 1189, 34 S. Ct. 612), and likewise the relations of those engaged in the business (*La Tourette* v. *McMaster*, 248 U. S. 465, 63 L. Ed. 362, 39 S. Ct. 160; *Stipcich* v. *Metropolitan L. Ins. Co.*, 277 U. S. 311, 320, 72 L. Ed. 895, 899, 48 S. Ct. 512). Compare *McCarter* v. *Firemen's Ins. Co.*, 74 N. Y. Eq. 372, 382, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048. * * *

"The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of the fire insurance for which the statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicates that such evils did exist. The record is barren of any allegation of facts tending to show unreasonableness."

The principle here involved, namely, the obligation of the surety to pay when the property of the appellee was devoted to that wherefor the surety was bound, was recognized and held constitutional in *Staten Island Rapid, etc.* v. *Phoenix I. Co.*, 74 L. Ed. 126, 281 U. S. 98. The business of appellant being affected with a public use, even under the 5th Amendment, the regulation of charges did not deprive it of liberty or property without due process. *Tagg Bros.* v. *United States*, 280 U. S. 420, 74 L. Ed. 524.

The landowner may well object to living in a house which was built with materials that were not paid for. This was recognized by this Court in the *Great Southern Case*, and furnishes an additional reason why this act is constitutional.

Appellant, having in possession the materials of appellee in virtue of installation in that wherefor appellant was normally bound, is estopped, by this constructive receipt, which in the normal travel advantaged it, to deny therefor responsibility when the appellee is without fault. Compare *Hightower* v. *Bailey*, 108 Ky. 198, 56 S. W. 147, 22 Ky. Law Rep. 88, 49 L. R. A. 255, 94 Am. St. Rep. 350.

Under Section 2, Chapter 128, Laws 1918, if the principal contractor desires to "Assign, transfer, or otherwise dispose * * * of the contract or proceeds thereof, to the detriment or prejudice of the subcontractor, materialmen or laborer," then he may not do so, unless the bond provided is given.

If the master workman or contractor does not assign, transfer or otherwise dispose of either the contract or its proceeds to the detriment or prejudice of the subcontractor, materialman or laborer, he may contract as often as he pleases, without bond; that is to say, if he forthwith applies the total proceeds of the contract to the liquidation of his individual liability to subcontractor, laborers, materialmen, the statute does not affect him in anyway.

It is when he desires to exercise a right, viz., to assign, transfer, or otherwise dispose of these amounts to the prejudice or detriment of those justly entitled thereunto, that the statute says, in order to obtain this right, he must execute a bond to protect those justly entitled.

The United States has adopted precisely this same protection. *United States* v. *American Surety Co.*, 200 U. S. 200, 50 L. Ed. 441. The Supreme Court of Mississippi gives the same effect to our statute. *Alabama Marble Co.* v. *U. S. F. & G. Co.*, 111 So. 573, 146 Miss. 414.

In *Mankin* v. *United States,* 215 U. S. 536, 54 L. Ed. 317, it was held, specifically, to be constitutional to impose this liability in favor of subcontractors, even though the full amount due had been paid.

In *Illinois Surety Co.* v. *Davis Co.,* 244 U. S. 380, 61 L. Ed. 1211, the Court said:

> "As the basis of recovery is supplying labor and material for work, he who has supplied these to a subcontractor may claim under the bond, even if the subcontractor has been fully paid. *Mankin* v. *United States,* 215 U. S. 533, 54 L. Ed. 315, 30 Sup. Ct. Rep. 174."

Counsel seeks to distinguish these cases on the ground that the United States, or the state, has plenary power to prescribe conditions of contract when the sovereign is contracting; but, in so far as the contractee is concerned, furnishing materials for the building where the land is owned by other than the contractor, the right, as to the contractee, is precisely similar to that here involved and here sustained. *Dickson* v. *U. S. F. & G. Co.,* 117 So. 248, 150 Miss. 864, *supra.*

Compare *Aetna Casualty & Surety Co.* v. *U. S. Gypsum Co.,* 39 S. W. (Ky.) (2d) (1913) 234 (a companion case which was followed in *Ramsey* v. *Vincennes Bridge Co.,* 283 U. S. 796, 75 L. Ed. 1420), where it was said:

> "It is argued that the distinction in the decisions depends upon the character of the subject-matter of the contract, and, when the contract concerns a public improvement, as here, it will be presumed that the bond was intended for the benefit of laborers and materialmen. It is said that they are unable to assert a lien on public property, and for that reason the bond is provided to supply the rights ordinarily given by lien laws. In amplification of the argument, it is insisted that, when the subject-matter of a contract is

a private structure, the lien laws of the state afford ample remedy, and it is unnecessary to resort to a bond for their protection. But such distinction is artificial and drawn from the accidental circumstances of the cases." * * *

"The same motive that prompted the passage of material and labor lien laws is sufficient to suggest the expediency of a surety contract for the benefit of those who perform labor or furnish material. A private owner may well desire to be free from the vexation of claims or suits, and to that end may require a bond to protect him against vexation as well as liability. It is conceivable that a private owner might wish not to have upon his property a structure composed of materials or erected by labor not paid for by the contractor. So, if the contract is sufficient in its terms to manifest an intention that the contractor shall pay for the labor and material, it is a valid obligation and enforceable in favor of any person for whose benefit it may have been executed."

The rule is that if it were constitutional to insert the name of this appellee as payee, then it would be constitutional to insert the provisions under which the obligation was to them payable, then, voluntarily, this corporation made the obligation for a valuable consideration. *Philip Carey Co.* v. *Maryland Casualty Co.*, 206 N. W. 808 (Iowa, 1926), where the Court said:

"(3) Where a statutory bond is given, the provisions of the statute will be read into the bond. *Asberg* v. *Ass'n*, 143 Minn. 354, 173 N. W. 708; *People* v. *Surety Co.*, 211 N. Y. 107, 105 N. E. 99; *School District* v. *Construction Co.*, 87 Or. 132, 169, P. 507, 788; *Nye-Schneider-Fowler Co.* v. *Roeser*, 103 Neb. 614, 173 N. W. 605; *United States ex rel. Hoffman* v. *Quincy*, 4 Wall (71 U. S. 535, 18 L. Ed. 403); *Northern Pacific R. Co.* v. *Wall*, 241 U. S. 87, 36 S. Ct. 493, 60 L. Ed. 905; *Gill* v. *Paysee* (Nev.), 299 P. 302; *Forgarty* v. *Davis, supra; Faurote* v. *State*, 110 Ind. 463,

11 N. E. 472; *Lowe* v. *City*, 4 Okla. 287, 44 P. 198; *Iddings Co.* v. *Construction Co.*, 104 Neb. 124, 175 N. W. 643, again, and aside from this well recognized rule, it is the plain requirements of the statute itself that the provisions and requirements of the act shall not be modified and annulled by statutory provisions in the bond."

Compare *Peoples* v. *Metropolitan Surety Co.*, 105 N. E. 99 (1914, N. Y.); *American Surety Co.* v. *Small Quarries*, 120 S. E. 617 (1923 Ga.).

Consider Section 2888 of Code of Mississippi 1930, providing:

"Conditions of Official Bonds.—The bonds of all officers required to give bond shall be conditioned in the following form, to-wit:

"'Whereas, the above bound A B was duly elected (or appointed) to the office of ——, on the — day of —— for the term of — years, from the — day of ——; therefore, if he shall faithfully perform all the duties of said office during his continuance therein, then the above obligation would be void.'

"But the failure to observe the form herein prescribed shall not vitiate any official bond; and all official bonds shall be valid and binding in whatever form they may be taken, except so far as they may be conditioned for the performance of acts in violation of the laws or policy of the state; and whether in the proper penalty or without any penalty, or whether correct or incorrect in its recital as to the term of office or otherwise, or whether property payable or whether approved by the proper officer or not approved by any, or if irregular in any other respect, such bond, if delivered as the official bond of the officer to the full penalty, or if it has no penalty, to the full penalty of the bond which might have been required."

This provision has been in effect since the Code of 1871, and has been enforced by divers decisions of the Court,

Cox v. *Ross,* 56 Miss. 481; *State* v. *Smith,* 87 Miss. 551, 40 So. 23; *Adams* v. *Williams,* 97 Miss. 113, 52 So. 865.

When, as here, the law prescribed what the penalty shall be, what the conditions shall be, it has been the holding of our State that a blank piece of paper properly signed was a valid bond. Furthermore, by Section 5185, Code of 1930, the legislature specifically provides the form of the "Mortgage clause". Under *Bacot* v. *Phenix Ins. Co.,* 96 Miss. 223, 60 So. 729, this section automatically writes itself into every insurance contract. *Aetna Ins. Co.* v. *Cowan,* 111 Miss. 473, 71 So. 746.

In the case at bar, the surety company has specifically contracted as a surety company doing business in the State of Mississippi, and is there engaged in this business, as a part and parcel of the modern protection, demanded under the name of insurance, the power of the State has become paramount to regulate and to integrate into this bond as into a policy, all of those things requisite and necessary to protect the citizen. This is a part of the insurance business, and this bond is given pursuant to permission granted to this company when it came into Mississippi, and it agreed specifically and definitely that it would be subject to the Department of Insurance. Section 5129, Code of 1930.

Similar statutes exist elsewhere. Compare *American Indemnity Co.* v. *Burrows Hardware Co.* (Tex. Civ. App.), 191 S. W. 574; *Rio Grande Lumber Co.* v. *Darke,* 167 Pac. 241, 1918 L. R. A. 1193.

A statute requiring the owner to take a bond, and making him liable in case one was not taken, has been in effect in Louisiana for a long time, and, as pointed out in *McDonald* v. *H. Gas & Oil Co.,* 2 La. App. 241, where the owner, in a contract, does not require a hundred per cent bond, Act No. 139 of 1922 does not apply. Bond Act No. 229 of 1916 does. See, also, *Baton Rouge Sash & Door Co.* v. *Deceur,*

2 L. App. 129; *Joubart* v. *U. S. F. & G. Co.*, 3 La. App. 525.

As pointed out in Tennessee, *Cole Manf. Co.* v. *Falls* (1891), 80 Tenn., 16 S. W. 1045, where a statute required the owner to pay a claim, in excess of the amount due on the contract price, in favor of materialmen, the court declared:

> "Double payment does not follow as a necessary legal consequent in any case. In every instance, the owner may fully protect himself by withholding the whole or a sufficiency, of the price agreed upon, from the original contract, until after the expiration of thirty days, or he may see to it, that the subcontractor and materialmen are paid as the work progresses, or he may indemnity himself by bond as prescribed in the 3rd. section of this act."

In Kansas, Code of 1925, Section 1401, a lien is given and in Section 1412 it is provided that the contractor or owner mentioned in this may execute a bond to the State of Kansas conditioned for payment of all claims which might be a basis for lien, * * * and when same has been filed, no lien, as herein provided for, shall attach. This statute has been in effect for many years, and has been treated as valid.

Under the Iowa Code, Section 3093, substantially similar provisions have been made.

In California, *Roystone Co.* v. *Darling*, 171 Cal. 526, 154 Pac. 15 (1915), approved in *Roberts* v. *Spires*, 232 Pac. 708, 195 Cal. 267, construed Section 1163 (1911) which described two classes of liens. One class consists of liens in cases where the bond has not been filed, in which case the state of accounts between the owner and contractor, and even the contract price, are immaterial to the lien, except as to the contractor. The other class consists of all cases in which the proper bond and contract are duly filed.

This *Roystone case* is reaffirmed in the case of *Hollenbeck* v. *Amweg*, 170 Pac. 148 (1917, 177 Cal. 159), in upholding the constitutionality of the above statute, wherein the Court said:

> "It is further urged that the provisions exempting the owner from liability beyond the contract price if he file a bond and making him liable for liens to the extent of the value of labor and materials if he does not provide such bonds is in violation of the constitutional inhibitions of the imposition of penalties by legislative enactment. The Constitution (Sec. 15, Act 22) guarantees a lien to mechanics and materialmen extending to the full value of all labor and materials furnished. But the Legislature may, under authority given by constitution, provide certain conditions upon companies with which the owner may restrict recovery to the sum mentioned in the contract. Such provisions does not impair any existing right of the owner—does not, in short, penalize him—but the effect is to confer a right not previously existing by which the liability may, under certain circumstances, be curtailed. *Stenson Mill Co.* v. *Nolan*, 5 Cal. App. 754, 91 Pac. 262."

There is, also, a similar provision in the Texas constitution. 40 *C. J.* 42.

The rule in California goes much further than it is essential to go in Mississippi. In the instant case, the bonds specifically provide for a liability, and even in the State of Texas they would be perfectly valid. See *Fife* v. *Indemnity Ins. Co.*, 283 S. W. 645.

In *Stewart* v. *Brewster*, 284 S. W. 53 (1929 Arl.) where it was contended a materialman could not recover on bond given by contractors to owner, because said materialman had not filed his claim for a lien as Sec. 6922 of C. & M. Digest required, the court held in overruling objection and construing the statute:

"It will be observed that it is not obligatory upon the owner of the improvement to require the principal contractor to execute a bond. He may do so or not, as he deems to his interest. Likewise, the contractor is not required by virtue of the law, to execute a bond. He may refuse to do so. It is entirely a matter between the contractor and the owner as to whether the bond provided by statute shall be executed. But, where such bond is required by the owner and executed by the principal contractor, then the persons for whose use and benefit the bond is executed (See 6909, *supra*) must look to the bond as their security for the payment of their claims and not to a lien on the improvement. In other words, where the bond provided for under 6912, of C. & M. Digest, is not executed those who are given a lien under Sec. 6906, *supra*, must comply with the provisions of Sec. 6922, *supra*, in order to avail themselves of the benefit of such lien; but if the bond is executed as provided by Sec. 6912, *supra*, then the parties having claims, which might be the basis of liens, do not have to comply with the provisions of Sec. 6922, *supra*, in order that they may establish and obtain the payment of their claims. They must resort to the bond. The language of Sec. 1, of Art. No. 446, of Acts of 1911, Sec. 6912, *supra*, shows that where the bond is executed pursuant to that section the persons otherwise entitled to liens are no longer entitled thereto, and hence would not have to comply with the provisions of Sec. 6922, *supra*, where the bond is executed, *ipso facto*, the provisions relating to liens on improvements are superseded and no lien can attach."

See *Accident & Indemnity Co.* v. *Knox Co.*, 132 Atl. 261 (Ky. 1926), where it is said:

"This Court has also decided on numerous occasions that those furnishing labor and material could recover on a contractor's bond where there was a statute or ordinance requiring that they should be protected by

the bond. *So. Md. Bank* v. *Nat. Surety Co., supra; American Fidelity Co.* v. *State,* 109 A. 99, 135 Md. 326; *Baltimore* v. *Casualty Co.,* 126 A. 880, 146 Md. 508, 513; *American Fidelity Co.* v. *State,* 97 A. 12, 126 Md. 50. In the case last cited the Court quoted with approval the statement found in an exhaustive note to *Knight & Jellison Co.* v. *Castle,* 27 L. R. A. (N. S.) 573.

Again, *Independence Trust Co.* v. *Porter,* 132 S. E. 806 (N. C. 1926), says:

"On these, the facts chiefly relevant, we think the demurrer as it relates to the second cause of action was properly overruled. Undoubtedly, the laborers, had they not assigned their claims, would have been entitled to maintain an action on said bond, and we think it must be held, in keeping with the general trend of authorities on the subject, that the claims of laborers and materialmen may be assigned without losing the protection of the bond given and intended for their benefit. *Title Guaranty & T. Co.* v. *Crane,* 31 S. Ct. 140, 219 U. S. 24, 55 L. Ed. 72; *Bank* v. *Casualty Co.,* 161 P. 475, 93 Wash. 635, Ann. Cas. 1918 D, 645.

"Here the bond in suit was intended to perform a double purpose: (1) To insure the faithful performance of all obligations assumed by the contractor toward the state highway commission, (2) to protect third persons furnishing materials or performing labor in and about the construction of said roadway. *Plyler* v. *Elliott,* 131 S. E. 306, 191 N. C. 49; *Town of Cornelius* v. *Lampton,* 128 S. E. 334, 189 N. C. 714. In its second aspect, the bond contains an agreement between the obligors and such third persons that they shall be paid for whatever labor or materials they furnish or supply to enable the principals in the bonds to carry out its contract with the state highway commission. *United States* v. *Natl. Surety Co.,* 92 F. 549, 34 C. C. 526."

Again, in *Yawkey-Crowley Lumber Co.* v. *Sinaiko,* 206 N. W. 976 (Wis. 1926):

"That the claims of those whom the owner paid for labor and material did not ripen into formal mechanic's liens so as to comply with the phrase in the contract concerning the bond and relating to such mechanics' liens is not at all material or controlling or in anyway limiting the liability of the surety. Upon the payment by the owner of the obligations of the contractor for labor and material left unpaid by him, such contractor, the owner clearly became subrogated to the rights of those whose labor and material were thus paid for as against the contractor and his surety on this bond. That such a bond does create an obligation in favor of third persons furnishing labor and material to such contractor has been too often held to now need discussion. *United States Gypsum Co.* v. *Gleason*, 135 Wis. 539, 543, 116 N. W. 238, 17 L. R. A. (N. S.) 906; *R. Connor Co.* v. *Etna Indemnity Co.*, 138 Wis. 13, 18, 115 N. W. 811 (in which is distinguished the case relied upon in the court below of *Elec. A. Co.* v. *United States F. & G. Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 800; *Warren Webster & Co.* v. *Beaumont Hotel Co.*, 151 Wis. 1, 10, 138 N. W. 102; *Concrete Steel Co.* v. *Ill. Surety Co.*, 163 Wis. 41, 47, 157 N. W. 543; *Builders' L. & S. Co.* v. *Chicago B. & S. Co.*, 167 Wis. 167, 170, 160 N. W. 320; *Building Cont. L. M. L. Ins. Co.* v. *Southern S. Co.*, 185 Wis. 83, 200 N. W. 770.

"Under the plain language of the bond, that the obligation of the surety is that the contractor will pay all the amounts due for labor and materials, required of him under the contract, as well as the condition that there shall be full and complete performance of the contract, which by its terms, in effect, requires the same thing, we can see no escape from liability of the surety for any amounts, not in excess of the sum of $8,000, which were properly paid by the owner in excess of the contract price in the completion of the work. That here was a gratuitous, as distinguished from a paid, surety, cannot permit the ignoring of unambiguous language such as is here presented in the bond itself. There is here no opportunity to indulge in strict or

liberal construction; it permits but of plain construction."

See *Rio Grande Lumber Co.* v. *Darke*, 50 Utah 114, *supra*.

Then, so far as this provision of the bond is concerned, substantially similar bonds in public contracts have been made effective by the Supreme Court of Mississippi in *U. S. F. & G. Co.* v. *Yazoo County*, 110 So. 780, 145 Miss. 378.

The case here is supported by the rule of *Surety Co.* v. *Hall Miller Co.*, 104 Miss. 626, 61 So. 700, where the Court said:

> "Taking it as a cold-blooded business proposition, this clause in the bond would naturally encourage subcontractors of the best sort to take contracts to do certain parts of the work; it would tend to prevent the abandonment of the work by mechanics not promptly paid their wages by the contractors, who might be suspected to be of doubtful financial solvency; it would procure the best work and material, and the prompt services of all workers and sub-contractors; and all of this would redound to the benefit of the public. It must be borne in mind that the mechanics, materialmen and laborers could have no lien upon the building, and that the trustees, representing the state, would not be bound to reserve money with which to pay their claims; but they would have to depend upon the contractor alone. Taking these things into consideration, the bond, in a way supplied the place of the mechanics' lien law, and thus gave an additional security to all persons working upon this building and supplying material therefor; and this alone was, in our opinion, of the highest importance to the State."

This principle would be applicable to public and private contracts.

Again, we cannot but reiterate that the agreement in this case was properly determined by the State Supreme Court as a State question, and to that end we rely with confi-

dence, upon the interpretation of the Kansas Court in *Algonite Stone Mfg. Co.* v. *F. & Dep. Co. of Maryland* (Kan. 1917), 163 Pac. 1076, 100 Kan. 28, where that court construed a bond far less express than this one to vouchsafe payment to materialmen. Compare also *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. 851; *Concrete Steel Co.* v. *Illinois Surety Co.* (Wis. 1916), 157 N. W. 543.

In conclusion upon this proposition, and by way of answer to some of the matters stated and contended for by opposing counsel, we desire further to submit the following:

The Owner, Natchez Investment Company, was the named obligee in the bond in suit. As such, it filed the original Bill of Complaint in this cause, wherein it averred this obligation upon the part of the appellant to pay, or, if it were mistaken in this obligation of the appellant, then to have adjudged invalid the assignment made by the principal contractor to the New Orleans Bank & Trust Co. The owner required this bond from Burkes, wherefor appellant was paid, and whereby appellant became bound unto the owner for the construction of a building containing the precise material furnished by this appellee's assignor. Had Burkes, the principal contractor, defaulted the first day after the bond was signed, then thereunder appellant was obligated to complete precisely as Burkes has done, and in completing it would have incurred the obligation for this precise property now therein which was obtained therefor from appellee's assignor, and appellant would have been compelled to pay therefor in cash. Each brick laid by the subcontractors and materialmen *pro tanto* lightened appellant's burden and thereby was a *pro tanto* equitable consideration for payment.

There can be no question as to Burkes and his responsibility when the owner was at pains to see that the contrac-

tor and his surety, appellant, were to pay for the *recordation of the lien privilege certificate as well as the required recordation of the contract and bond and its release* (333 Tr. 1617), terms imported from the Louisiana law. It is but proper to assume that the more important obligation to pay subcontractors thereunder to be obtained were specifically undertaken, especially in view of those conditions in the bond whereby appellant was at pains to escape responsibility for (5) destruction by fire, riot, mob, etc.; (6) guarantees of the work specified in the contract, and of its efficiency, its wearing qualities and for maintenance of or repairs thereto; and the payment of any damages or compensation either at common law or under any statute, Federal or State, arising from or growing out of injuries to persons or property; and for failure to procure insurance; and for (7) infringement of patents (333 Tr. 19, 20).

None of the evidence before the trial court is presented in this record on this appeal. The decisions of the Supreme Court of Mississippi are here, but it does not appear but that before any of the alleged defaults, now complained of by appellant and whereby a discharge is claimed, the material had been in good faith delivered, and that sought by appellant as to the materialmen is an *ex post facto* deprivation by an act of the contractor or owner. Appellees are sought to have their rights taken away by alleged defaults, of which there is here no evidence, and for which, if any existed, this appellee is not responsible.

Bonds of this character contain two several separate obligations: One to the obligee, and the other to those who are thereby and thereunder to be protected.

As to this, in *U. S. F. & G. Co.* v. *U. S.*, 191 U. S. 246, 48 L. Ed. 246, it is said:

> "We find no difficulty whatever in answering this question in the negative. The rule of *strictissimi juris*

is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud or unfair dealing on the part of a subcontractor, as was the case in *United States use of Heise* v. *American Bonding & T. Co.*, 89 Fed. 921, 925, or to cases not otherwise within the scope of the undertaking.

"Bonds containing the covenant in question are not common, though they have sometimes appeared in the state courts, and the construction here given them has been generally adopted (*United States use of Snyder* v. *Hazard*, 53 App. Div. 410, 65 N. Y. Supp. 1051), although these cases have generally turned upon the question whether the rights of the materialmen were affected by a change made in the contract by the principals. *Dewey* v. *State*, 91 Ind. 173; *Conn* v. *State*, 125 Ind. 514, 25 N. E. 443; *Steffes* v. *Lemke*, 40 Minn. 27, 41 N. W. 302; *Doll* v. *Crume*, 41 Neb. 655, 59 N. W. 806; *Kaufmann* v. *Cooper*, 46 Neb. 644, 65 N. W. 796; *Griffith* v. *Bundle*, 23 Wash. 453, 55 L. R. A. 381, 63 Pac. 199."

Compare *Pingrey on Suretyship & Guaranty*, Sec. 112, p. 139; *Doll* v. *Crume, supra; Federal Union Surety Co.* v. *Commonwealth*, 129 S. W. 335, 139 Ky. 92; *Forburger Stone Co.* v. *Lion Bonding & Surety Co.*, 170 N. W. 897, 103 Neb. 202; *Standard Salt & Cement Co.* v. *National Surety Co.*, 158 N. W. 802, 134 Minn. 121.

Further the courts have been at pains to hold that, with a corporate surety, being thus paid, there must be proof of damage before discharge. Herein thereof there is none.

Atlantic Trust & Dep. Co. v. *Laurinburg*, 163 Fed. 690, 695; *City of Topeka* v. *Federal Union Surety Co.*, 213 Fed. 958, 963; *Maryland Casualty Co.* v. *Fowler*, 31 F. (2d) 881, 884; *Atlas Assurance Co.* v. *Lawrence*, 34 Fed. (2d) 401, 404; *West* v. *Detroit Fid. & Surety Co.*, 225 N. W. 675, 118 Neb. 554; *Philadelphia* v. *Fid. & Dep. Co.*, 80 Atl. 62, 63, 231 Pa. 208; *U. S. F. & G. Co.* v. *United States*, 178 Fed. 692; *City of Montpelier* v *National Surety Co.*, 97 Vt. 111, 122 Atl. 488; *People* v. *Traves*, 154 N. W. 130, 188 Mich. 415; *American Surety Co.* v. *Smith*, 130 So. (Fla.), 442; *Johnson* v. *Casualty Co.*, 133 So. (Fla.), 850.

Note that this foreign company was at pains, directly in the teeth of our statutes, to stipulate that "no action, suit or proceedings shall be had or maintained against a surety under this bond unless it shall be brought or instituted and process served upon the surety within six months after the contract and in no event after six months subsequent to the date, time or period fixed in the contract for the completion of the work specified therein" (333 Tr. 20, Par. 9).

Sec. 2294, Miss. Code 1930; *Lasky* v. *Southern Express Co.*, 92 Miss. 268, 45 So. 869; *Standard, etc.*, v. *Broom*, 111 Miss. 409, 71 So. 653; *Sovereign Camp, etc.*, v. *Miller*, 125 Miss. 502, 87 So. 892; *Stuyvesant* v. *Smith*, 135 Miss. 585, 99 So. 575.

Counsel's declaration that "the parties were studiously attempting to draw a special contract which would not impose upon the surety the liability imposed under Section 3 of the Statute" is not accurate, for this bond, as is, with this contract, as is, comes from Louisiana where the obligation to pay is as above indicated and absolute.

The Contract and bond, as written, were construed in this case with reference to the Mississippi statute, and all that was held herein was that this particular bond, with the particular and express provision therein referring to

the contract documents did constitute such a bond as was contemplated by the statute and whereon the materialmen might recover. The Court has not as yet denied the right to the landowner to take a different bond; but this particular landowner did take this bond and in taking, thought, as his bill averred, that he had that specifically which the Supreme Court of Mississippi held he had received. The only attempt at denial is as to a surety, who signed the bond, giving the right *assumed and understood by the landowner to have been given as to the obligations of the surety.*

Counsel is beside the mark in claiming that the landowner here did not understand that under this bond the obligation to pay existed.

Complainant in its original bill averred and charged that the parties herein named as furnishing material in connection with said project No. 640, to said contractors "have not been paid and are entitled to recover the amount owing to them by said contractor, and *to have judgment for said amount on said bond,*" but in the alternative, if the bond be not such a performance bond, then to have the assignments to the New Orleans Bank vacated. The appellant is in serious error when it seeks to assert that the landowner here did not intend to contract and did not believe that it had contracted for a performance bond for the payment of the materialmen. The original bill here filed so shows.

The amount of the bond in this case is $316,822.00, the precise amount of the contract, and counsel is in error in asserting that more than the amount of this bond might be recovered. Compare Section 758, Code of Miss., 1930; *Parsons, etc.,* v. *Furr,* 110 Miss. 795, 70 So. 895; *National Surety Co.* v. *Lee,* 125 Miss. 517, 88 So. 7.

Counsel's contention that there was an express condition that the bond should not inure to the benefit of material-

men, and that therefore the statute was unconstitutional for its abridgment of the liberty of contract (Brief, p. 24), is answered by the observation of *Leslie Lumber & Supply Co.* v. *Lawrence* (Ark. 1928), 11 S. W. (2d) 458:

> "This provision is plainly in conflict with the condition in the bond just discussed and with the law applicable thereto as stated. By the first condition the bond company has provided protection for a class of persons who, under the law, may sue; yet by the last provision it is provided that they may not sue. Both cannot stand. Surety contracts of this character, with a paid surety, are regarded as in the nature of insurance contracts, and will be most strongly construed against the surety. *Union Indemnity Co.* v. *Forgey & Hanson,* 174 Ark. 1110, 1115, 298 S. W. 1032, and cases cited. Applying this rule to the contract in question, the third clause in the bond must give way to the first and be given no force or effect."

It is further answered by a correct interpretation of the bond. The facts presented to the Supreme Court of Mississippi are not presented to this Court in so far as the rights of all the materialmen are or were concerned; the record, as now presented, nowhere shows that the owner paid the contractor in notes instead of cash, and that question cannot be here argued, especially as no damage was shown to have therefrom resulted.

Counsel is in error in stating the extent to which the Supreme Court of Mississippi has limited the rights of the respective parties to this litigation. It has gone no further than to determine this particular case under this particular bond and contract documents, and thereby there has been no ruthless disregard of private rights.

Counsel's dissertation as to who can give these bonds, and the number of contractors, etc., we say, with respect, has no foundation in fact, nor is such argument pertinent

to the issues; for that wherein Mississippi was interested was, when the material or labor of its citizens was placed upon land, and in buildings, and thereby the value of such land was enhanced, that the surety for the performance of the contractor should be responsible to the laborer and materialmen therefor. Being obligated to perform the contract, should the principal therein fail, *each contribution of material made was an advance to the surety whereby that for value by the surety guaranteed was, in part, done,* and that now herein sought is the ungracious contention on the part of the surety that, when materialmen have by their contributions aided the performance of that guaranteed by the surety and wherefor the surety was unconditionally bound, there will be to them no compensation for that from them thus taken by the surety.

As demonstrated by Mr. Justice Lurton in the *Great Southern Hotel Company case, supra,* approved by this court in 193 U. S. 532, 48 L. Ed. 778, responsibility is unquestioned and imposed upon this surety who thus used for its exoneration, the material contributed by these appellees. Had they not contributed this material—this labor, then to perform appellant would of necessity have been compelled to go elsewhere thus to obtain that so thus requisite, and when under the agreement appellees had so thus to it furnished value, it was competent for the Mississippi Legislature under the precise ruling approved by this Court to impose therefor an obligation on that surety which had undertaken to do that which was thus aided and rendered possible, by the material belonging to appellees.

The statutory requirement existed when the appellant executed this bond and the law of Mississippi as thus existent, was thereby thereinto written and not only written, but agreed to, and having been agreed to, no complaint may be thereof made. *Farmers & Merchants Bank* v. *Federal Reserve Bank,* 262 U. S. 660, 67 L. Ed. 1182;

Pennsylvania, etc., Co. v. *Gold Issue, etc., Co.*, 243 U. S. 93, 61 L. Ed. 610.

Counsel states truly: "The surety had the right to come in and complete the work." This was its obligation. When in order to fulfill that obligation the laborers and materialmen contributed of their labor and materials they thereby for the benefit of the surety furnished value for the obligation now exacted, and if it be that at a subsequent time, without fault upon the part of the appellees, there was a failure by the contractor to do that which he should as to the surety, therefor the appellees are not in any way responsible. *Ashville Supply & Foundry Co.* v. *Catawba Const. Co.* (N. C. 1930), 151 S. E. 93; *Graphic Arts Bldg. Co.* v. *Union Indemnity Co.*, 163 La. 1, 111 So. 470. When one of two innocent persons must suffer, the law may direct which will bear the burden, and this direction so made in this cause by the Statute of Mississippi is reasonable. The Appellee is not interested in anything other or further than that under and with the consent of owner, contractor, and appellant, its assignor furnished material to the extent wherefor a decree was rendered. That material was integrated into a building which the surety was bound to see completed and to save harmless the landowner. Therefore, to the surety that thus done by the materialmen inured, and the point here at issue is may Mississippi exact of the appellant, thus receiving, value for that thus received.

As said in *Lockland Lumber Co.* v. *Robinson*, 157 N. E. (Ohio) 376, mechanics lien statutes do not create rights but merely afford additional remedies for rights in equity theretofore existing. "Natural equities in favor of materialmen as creditors of the contractor give reason and constitutional validity to such a provision."

This Court cannot consider the constitutional right of the landowner; he does not complain, but avers the obliga-

tion of the surety to do that by the Supreme Court of Mississippi to him adjudged to have been done. The surety has our goods towards the fulfillment of his contract, rendered immovable and impossible of again being restored, and it is just, having agreed, as he here did, to pay, that the statute make him do that which he has covenanted.

The liberty of contract is not here sought to be taken away. We subscribe to every decision cited by appellant from this Court; but that which appellant overlooks is that, while there is a liberty of contract, when a statute, as here, deals with the doing of justice, and only vouchsafes, as against one bound to construct a building, a decree for that contributed without fault by the appellees, that thereasto the surety so thus giving bond has no cause to complain.

POINT IV.

Should the court determine Section 3 aforesaid to be unconstitutional, yet notwithstanding, the bond executed may be sustained as a valid common-law obligation and the judgment of the Supreme Court of Mississippi cannot be reversed, as an adequate obligation existed under this common-law obligation for judgment rendered.

> "It is only when a decision on the validity of a statute is necessary to the determination of the cause that the same will be made." (*State* v. *Stanton*, 6 Wall. 50, 18 L. Ed. 721; *Allen* v. *State of Ga.*, 166 U. S. 138, 41 L. Ed. 951; *Sully* v. *American Natl. Bank*, 178 U. S. 289, 44 L. Ed. 1072).

The Mississippi Supreme Court held on the appeal to settle the principles of the instant case, that—

> "It was the intention of all the parties to give bond therein provided for and that the bond is to be construed in connection with the contract; it was designed

to protect the Owner and Contractor and that it was so dealt with by all the parties.

"It will be seen from a recital of the bond itself that it referred to the contract and to the plans and specifications made a part of the contract and the bond.

"This being true, it is plain, we think, that it was the intention and purpose of the parties to execute a bond in conformity with Section 3 of the Act above quoted" (333 Tr. page 56).

Practically without exception the courts of this country have held that where a bond and another contract or instrument relate to and form one and the same transaction, *or the bond refers to such other instrument* or is conditioned for the performance of specific agreements set forth therein, such instrument with all its stipulations, limitations, or restrictions becomes a part of the bond, and the two should be read together and construed as a whole. *Finley* v. *Lynn*, 6 Cranch 238, 3 L. Ed. 211; *Frost* v. *Leonard*, 112 Ala. 296, 20 So. 587; *Matson* v. *Blossom*, 2 N. Y. S. 551, 4 N. Y. S. 489; *Despres* v. *Folz*, 134 Ill. A. 111.

Where a bond refers to another document which specifies purposes for which it is given, such bond embodies such purposes therein: AND THE BOND WILL BE CONSTRUED WITH THE SAME CONDITIONS AND LIMITATIONS ONLY AS THAT OF THE CONTRACT REFERRED TO.

Fidelity Trust Co. v. *American Surety Co.*, 175 Fed. 200 (aff. 179 Fed. 699, 103 C. C. A. 29);
Aetna L. Ins. Co. v. *American Surety Co.*, 34 Fed. 291;
U. S. v. *Maurice*, 26 F. Cas. No. 15,747, 2 Brock. 96;
U. S. v. *Tillotson*, 28 F. Cas. No. 16,524, 1 Paine 305.

In the instant case the bond referred to the contract documents and thereby in express terms made the contract documents a part of the bond—stating with reference to the contract documents—"*a copy of which is or may be attached hereto, and is hereby referred to and made a part*

hereof." Therefore the provisions of the contract documents evidence the intention of the parties to the bond and control the same as a matter of legal construction of the terms thereof.

The contract documents made specific reference to the statute of Mississippi, and, regardless of whether or not that statute should be held unconstitutional as an enforcible act, yet the parties themselves voluntarily adopted its terms into their voluntary contract and are, therefore, now bound by its terms as a provision of their contract, even if they are not bound thereunder as by force of a statute. *Southern Surety Co.* v. *Nalle & Co.* (Texas) 242 S. W. 197.

The *Nalle case* was brought on a building bond conditioned for faithful performance of the contract. The court in discussing the case stated an established rule of law, which, we submit, is applicable to the present case now here on appeal, even in event the Mississippi statute could be held unconstitutional. The court in the *Nalle case* said:

> "There is nothing in the record showing or tending to show that the owners in taking this bond were constrained to do so solely by virtue of said statute or that any of its terms or conditions were demanded by the owners solely by reason thereof.
>
> "*There is nothing in the record showing or tending to show that the bond or any of its terms or provisions were anything other than mutual voluntary agreements and engagements of the parties.*
>
> "The record in this case merely shows the bond sued on. When such bond is compared with certain articles of the statute we find that the penalty therefor is in the minimum amount and that it is payable and conditioned substantially as prescribed by them.
>
> "*Where a bond is wrongfully demanded under color of official authority or as a condition to some act, privilege or benefit to which the maker is entitled without giving any bond, such bond, if given, will be held void for duress.* (*Dupree* v. *State*, 102 Texas 455, 471; 119

S. W. 301; *Leona Irr. Man. & Canal Co.* v. *Roberts*, 52 Texas 615, 622).

"*The general rule is that a bond, whether required by statute or not is good at common law if entered into voluntarily* and for a valid consideration, and if not repugnant to the letter or policy of the law.

"A bond executed in pursuance of a statute is not necessarily void because the statute is afterwards declared unconstitutional. If entered into for a lawful purpose without duress and for a valid consideration independent of the statute, such bond may be enforced as a common law obligation."

(9 C. J. pages 28 and 29, paragraphs 43 and 45; 4 R. C. L. page 55, paragraph 15; and other cases there cited.)

The *Nalle case, supra* is directly in support of the above case, and the same is supported by other Texas cases, amongst which is that of *Equitable Surety Company* v. *Stemmons*, reported in 239 S. W. 1037.

In the *Hartford Accident & Indemnity Company case* here on appeal it was established that the specifications, plans and agreement became a part of the bond and were incorporated therein and that the bond became a part of the contract of the Natchez Investment Company with Burkes, the contractor, and the bond company; and that the surety on the bond by reference to the bond and the contract documents undertook on its part the performance of all the obligations of the principal contractors, Burkes. Such were the findings of fact by the Chancellor and affirmed by the Supreme Court of Mississippi.

We submit that under the wording of the contract and specifications one conclusion only can be drawn as to the intent of the parties entering into the contract and that was that the bond was to be given whereby Burkes & Company, the builders, were to erect the Eola Hotel and were to pay for all materials and labor entering into the same, that it

was the intent to incorporate into the contract and bond the wording and provisions of the statute, being Chapter 128, Laws of 1918; and we, therefore, submit further, that the bond, even though Section 3 of the Statute, Chapter 128, Laws of 1918, should appear to the court as being unconstitutional, yet the bond would still stand as a common law obligation and would be enforcible although the statute might be declared unconstitutional.

The reasons for these conclusions are:

(1) That the bond in question was voluntarily entered into by all the parties without compulsion by statute, and the statute did not require the giving of any bond, but simply wrote the terms and conditions into the bond in event same should be given.

(2) There was a valid consideration paid for the bond premium.

(3) That the consideration was received by the appellant here and the benefits thereof retained by the appellant and that no tender has been made back.

(4) That the benefits accruing from the giving of the bond have been used and enjoyed by the principal, Burkes, and by their sureties, Hartford Accident & Indemnity Co., appellant here, in that by giving of the bond the principal was enabled to make use of the proceeds of the contract price and the surety has been enabled to have his principal complete the building in accordance with the plans and specifications and the liability of the surety thereby reduced *pro tanto* from original figure of $316,822 to a figure of only approximately $60,000, the aggregate of all claims filed against the surety—and there remaining now unpaid only the claim of this appellee upon a claim involving the principal sum of only about $5,900.

The law as announced in the *Nalle case, supra*, is in line with the holdings of this Court, in *Daniels* v. *Tierny*, 102 U. S. 415, 26 L. Ed. 187, which action was on a bond authorized under the Virginia Secession Ordinance, which provided that by giving a bond the debtor might prevent the enforcement of execution against him. The court in the case cited pronounced the statute void, but held that inasmuch as the obligor had enjoyed its benefits by obtaining a stay of execution he was estopped to question its validity. The language therein used is peculiarly applicable here:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself, for his benefit, of an unconstitutional law, he cannot in a subsequent litigation with others not in that position aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such case the principle of estoppel applies with full force and conclusive effect" (*Daniels* v. *Tierny, supra*).

See also *Stevenson* v. *Morgan*, 67 Neb. 207; 93 N. W. 180; 108 A. S. R. 629.

See also *U. S. F. & G. Co.* v. *Ettenheimer*, 70 Neb. 144, 97 N. W. 227; 113 A. S. R. 783.

To the same effect it was held in *Douglass* v. *Unmark*, 77 Conn. 181, 107 A. S. R. 25, that an unsuccessful plaintiff in replevin who has seized goods belonging to the defendant is estopped, together with his bondsmen in an action upon recognizance, from alleging, or being benefited by, the fact that it was entered into before a magistrate other than the one who signed the writ.

The bond in question here was a voluntary bond and is good at common law for the reason that there was a valid consideration therefor and that there is nothing repugnant

to the letter or the policy of the law of Mississippi or of the Constitution of the United States in the giving of this bond.

See *Moses* v. *U. S.*, 166 U. S. 571, 586; 17 Sup. Ct. 682; 41 L. Ed. 1119.

The decision of the Supreme Court of Mississippi in this cause here can, therefore, be upheld on the grounds that the bond in question is a common law bond, regardless of the constitutionality or unconstitutionality of the statute, and the question of the legality of the statute need not be decided in order to reach the conclusion already arrived at in this case.

In conclusion, on this proposition, we have to say that counsel for appellant state in their brief that the record in this case shows that the appellant, surety company, sought studiously to avoid giving the statutory bond under Chapter 128 of the Laws of Mississippi of 1918.

We submit, on the contrary, that the record in this case shows that such was not the intention of the owner of the building, the contractors, Burkes, or of Hartford Accident & Indemnity Company, the surety; but, the contract documents controlling the recitations in the bond, it is shown clearly that it was the intention of the parties, the owner, the contractor, Burkes, and the surety, Hartford Accident & Indemnity Company, to give the kind of bond provided for under the laws of the State of Mississippi.

Furthermore, with deference to this Court, these are questions of fact with which this Court will not concern itself. The facts were submitted to the Chancery Court of Adams County, Mississippi, and by it adjudicated adversely to Hartford Accident & Indemnity Company, and this finding of fact by the Chancery Court of Adams County, Mississippi, has been upheld and affirmed by the Supreme Court of the State of Mississippi.

No testimony taken on the trial of this cause is before this Court in the Record whereby the decisions of the lower courts can be gainsaid.

POINT V.

The judgments and opinions of the Supreme Court of Mississippi of dates February 23d and June 15th, 1931, (No. 333, Tr. 67 and 86) were final within the meaning of the Judicial Code, Sec. 237, and no appeal having been perfected therefrom the same became the law of the case and binding upon all parties hereto and upon the Mississippi courts in this cause, whereby all questions raised on this appeal are res adjudicata. The appellant not having perfected an appeal from said prior and final judgment can not appeal from the judgment and decree of the Supreme Court of Mississippi of date May 1st, 1933.

We have advanced this proposition in our Motion to Dismiss or Affirm, and respectfully refer the Court to Point II in our Brief in support of that Motion. Whereas the Court has noted probable jurisdiction, we understand that upon the hearing it will consider the Motion to Dismiss or Affirm, and, though called upon by the Court to brief this case upon the merits, we yet insist upon that Motion and raise the same proposition in this our Brief upon the Merits on this appeal.

Without desiring to burden the Court by any repetition of our former Brief on Motion to Dismiss we yet desire to call the Court's attention to certain other authorities which support the same.

First, we direct the Court's consideration to the fact this is an action in the nature of an interpleader. Chapter 128, Laws of Mississippi of 1918, prescribe the procedure for the method of bringing in parties, etc., and Section 6 of that Act, being Sec. 2279 Mississippi Code of 1930, provides as follows:

"BOND—SUIT—ONLY ONE ACTION—When suit is so instituted by any person *only one action shall be brought* and any person entitled to sue may upon application intervene and be made a party to said suit. * * *"

Proceedings in Intervention are largely the creatures of Statute. Such were not known at common law, but in the progress of modern jurisprudence the practice of permitting intervention so that all litigation relating to the subject matter may be determined in one action as to all parties therein interested. It is well settled that the judgment in the main issues is binding upon all parties in the issues involved in intervention. See note and authorities cited 123 A. S. R., 313.

That the Judgments and Opinions of the Supreme Court of the State of Mississippi as to which an appeal was attempted in Cause No. 333, October Term, 1931, were final and therefore appealable within the meaning of the Judicial Code, Sec. 237, (36 Stat. at L. 1156, Chap. 231, Comp. Stat. 1913, Sec. 1214), can not be disputed and as we have demonstrated that judgment having been affirmed by the Court here having sustained the Motion of Appellees in that proceeding to dismiss or affirm, such became binding upon all the parties to the original cause instituted in the Chancery Court of Adams County, Mississippi, being Cause No. 5323 on the Docket of that Court.

That the final judgment of the Supreme Court of Mississippi from which no appeal was perfected (though attempted) is not now subject to review on appeal as to that thereby determined is well settled by the best authorities of this country, for there must be an end to litigation. It would be inconceivable that in one case there would be as to different parties an entirely opposite conclusion or determination. We respectfully refer the Court to the case of *Gorman* v. *St. Bernard*, 111 Ohio St. 726, 146 N. E. 291,

41 A. L. R., 1057, and to the Annotation upon this subject appearing in 41 A. L. R., commencing at page 1078. We well recognize that the Supreme Court of the United States is not bound by the doctrine of the law of the case in any cause coming before it, although the Supreme Court of the State from which an appeal has been perfected may by its rules be bound by that doctrine; but here is presented a different situation, for there was a final appealable judgment rendered by the Supreme Court of the State of Mississippi from which an appeal could have been taken by proper proceedings to this Court and such was not done.

Compare *U. S.* v. *Denver & R. G. R. Co.*, 191 U. S. 84, 93, 48 L. Ed. 106, 109, 24 S. Ct. Rep. 33, for the distinction.

In that case the United States Supreme Court refused to be bound by the doctrine of the law of the case and reviewed the cause upon appeal but held as its reason for so doing that the judgment of the Supreme Court which had been before this Court previously upon certiorari was an interlocutory judgment and not a final judgment within the meaning of the Judicial Code, Sec 237. We respectfully submit that the case of *Rio Grande Western Railway Co.* v. *Stringer*, 239 U. S. 44, 36 Sup. Ct. 5, cited by us on page 13 of our Brief in support of our Motion to Dismiss controls here.

WHEREFORE, we respectfully submit that this cause should be affirmed.

Respectfully,

GERARD BRANDON,
GERARD H. BRANDON,
Attorneys for Appellee.
By GERARD H. BRANDON.

The undersigned, G. H. Brandon, one of Attorneys of record for the Appellee herein does certify that on this the

21st day of December, 1933, he mailed by United States Mail, postage prepaid, a true copy of the foregoing brief to each the Hon. W. Colvin Wells and the Hon. L. Barrett Jones, attorneys of record for the Appellants, addressed to them at their usual post office address, Lamar Life Building, Jackson, Mississippi.

GERARD H. BRANDON,
Attorney for Appellee.

(4368)

SUPREME COURT OF THE UNITED STATES.

No. 239.—October Term, 1933.

Hartford Accident & Indemnity Company and Aetna Casualty & Surety Company, Appellants, *vs.* N. O. Nelson Manufacturing Company, Assignee.	Appeal from the Supreme Court of Mississippi.

[February 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy hinges upon the validity of a statute of Mississippi whereby the bond of a contractor guaranteeing to an owner the faithful performance of a contract for the construction of a building shall inure to the benefit of persons furnishing material or labor, and this though the bond expresses an intention to exclude them.

The statute challenged by the appellants was enacted in March, 1918, and is framed for the protection of subcontractors, materialmen, laborers and journeymen who have had a part in the making of buildings or of structures akin thereto Laws of 1918, c. 128; Mississippi Code of 1930, §§ 2274-2281.

By section 1 (which amended § 3074 of the Code of 1906), materialmen or laborers, not paid by a contractor, may give notice in writing to the owner, and thereupon any amount due from the owner to the contractor shall be bound in the hands of the owner for the payment *pro rata* of claims covered by the notice.

By section 2, no contractor may "assign, transfer, or otherwise dispose of in any way, the contract or the proceeds thereof, to the detriment or prejudice" of materialmen or laborers, and "all such assignments, transfers, or dispositions" shall be in subordination to their rights, "provided, however, that this section shall not apply to any contract or agreement where the contractor or the master workman shall enter into a solvent bond" conditioned as provided for in section 3 thereof.

By section 3, any bond for the faithful performance of a building contract shall include a guarantee that the contractor shall

make payment to materialmen and laborers, and if such a provision is omitted, the bond shall inure to the protection of materialmen and laborers as if the provision were expressed. The text of this section is quoted in the margin.[1]

In October, 1926, Natchez Investment Company, Inc., the owner of land in Natchez, Mississippi, made a contract with builders, J. V. and R. T. Burkes, for the construction of a hotel. The Burkes made a subcontract with Acme Engineering Company for the plumbing, heating and ventilating work, and the subcontractor assigned its contract to the N. O. Nelson Manufacturing Company, the appellee in this court. By the principal contract provision was made for the giving of a bond which was to secure materialmen and laborers as well as the owner.[2] Thereafter the contractors

[1]Sec. 3. That when any contractor or subcontractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor, shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond; and any such person who has furnished labor or materials used therein for which payment has not been made, shall have the right to intervene and be made a party to any action instituted on such bond, and to have his rights adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the rights or claim for damages or otherwise, of the obligee. If the full amount of the liability of the surety thereon is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the obligee, the remainder shall be distributed pro rata among said intervenors. The bond herein provided for may be made by any surety company authorized to do business in the State of Mississippi.

[2]The specifications state that "it shall be the obligation of every contractor and sub-contractor estimating upon work under this contract operation to figure and include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architects". "The bond shall . . . secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications," and "shall protect the Owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi."

did furnish a bond for the cost of the building ($316,822) with the Hartford Accident & Indemnity Company as surety, but a bond giving narrower protection, or so the surety contends, than the one that had been promised. The bond that was furnished refers to and incorporates the contract between the owner and the builders. It provides that if the principal shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract, the obligation shall be void, otherwise to remain in force, provided, however, that the obligee shall have complied with certain conditions precedent for the protection of the surety. One is that the terms of the building contract shall be faithfully fulfilled in so far as they call for performance on the part of the owner, the surety to be relieved of all liability in the event of a default. Another is that if the obligee shall have notice of any claim against the contractor for unpaid labor or material, no further payments shall be made by the obligee to the contractor until such claims are satisfied. Finally, in an effort to cut off materialmen and laborers, the bond provides that "no right of action shall accrue upon or by reason hereof to or for the benefit of any one other than the obligee named herein."

The contractors for the building made default in the performance of their contract owing large sums of money to materialmen and laborers, including Acme Engineering Co., appellee's assignor. Thereupon, the Investment Company, the owner, sued in the Chancery Court of Adams County, Mississippi for a decree construing the bond, adjudging that it was subject to the rights and liabilities defined in § 3 of the statute, and determining the proportionate interests of those entitled thereunder. The contractors, the surety, and various subcontractors, materialmen and laborers were joined as defendants, as well as an assignee of moneys due upon the contract. Other subcontractors and materialmen intervened and by cross bill and otherwise sought relief upon the bond. The Supreme Court of Mississippi held upon demurrer that the bond was one for the faithful performance of a building contract within § 3 of the statute; that its effect was to substitute a new security for the protection of materialmen and laborers in place of that provided by §§ 1 and 2; and that by force of that substitution the contractor had become free to assign and dispose of the contract and the proceeds thereof. An assignment to a bank of

moneys due from the owner to the amount of upwards of $26,000 was accordingly sustained. *Hartford Accident & Indemnity Co.* v. *Natchez Investment Co.*, 155 Miss. 31. The cause having been remanded to the Court of Chancery, there was a trial of the issues, which was followed by a new appeal. *Hartford Accident & Indemnity Co.* v. *Natchez Investment Co.*, 161 Miss. 198, 219; 132 So. 535. On that appeal the court reiterated its ruling as to the operation of the bond. It held that "none of the provisions of the bond had the effect of writing out of the contract" the provisions of the statute, "and could not have that effect." "All stipulations contrary to the statutory provisions must be disregarded so far as persons furnishing labor or material are concerned." An appeal to this court was dismissed for defect of parties. *Hartford Accident & Indemnity Co.* v. *Bunn*, 285 U. S. 169.

In the meantime, the N. O. Nelson Manufacturing Company, the present appellee, had intervened in the Court of Chancery by leave of that court, and had made claim to its proportionate share of the proceeds of the bond. The surety renewed the contest, as it was privileged to do (*Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 127), insisting that the bond was unaffected by the statute, and that there could be no holding to the contrary without an arbitrary interference with liberty of contract and a resulting violation of the Fourteenth Amendment. The Chancellor, overruling these contentions, gave judgment upon the bond in favor of the intervening claimant. The Supreme Court of Mississippi affirmed upon the authority of its earlier opinions. 147 So. 815. See also *U. S. F. & G. Co.* v. *Parsons*, 147 Miss. 335. An appeal to this court followed, the surety on the appeal bond joining as appellant with the surety on the bond in suit. *Hartford Accident & Indemnity Co.* v. *Bunn, supra.*

As to the meaning of the statute now challenged as invalid the Supreme Court of Mississippi speaks with ultimate authority. *Knights of Pythais* v. *Meyer*, 265 U. S. 30, 32; *Great Northern Ry. Co.* v. *Sunburst Co.*, 287 U. S. 358, 362; *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, 513. We assume in accordance with its ruling that the statute was intended to apply to such a bond as the one in controversy here, and to blot out the clauses repugnant to the statutory scheme. The only question in this court is whether the result is consistent with the Constitution of the United States.

Opposition is asserted by counsel for the surety. We think it is unreal.

Materialmen and laborers may be secured by mechanics' liens upon land improved or affected by their material or labor, and this without reference to technical and ancient concepts of privity of contract. *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532, 550; *Jones* v. *Great Southern Hotel Co.*, 86 Fed. 370; *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 9, 10. For like reasons they may be secured as against the owner by a lien upon any moneys due to the contractor, and secured as against the contractor by a lien upon any moneys collected from the owner. *Hartford Accident & Indemnity Co.* v. *Natchez Investment Co.*, 155 Miss. 31, 51; *U. S. F. & G. Co.* v. *Parsons, supra;* cf. *United States* v. *American Surety Co.*, 200 U. S. 197; *Mankin* v. *United States*, 215 U. S. 533; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380. The fundamental liberties protected by the Fourteenth Amendment do not include immunity from restraints so deeply rooted in policy and justice. *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U. S. 151, 157; *Advance-Rumely Thresher Co.* v. *Jackson*, 287 U. S. 283. The owner contracting with a builder or making payments under the contract may be required to give heed to the equities of a subcontractor or a workman adding value to the land. The builder may be required to give heed to the same equities in contracting with the owner or in disposing of his contract or of the moneys paid thereunder.

The statute of Mississippi was framed in a genuine endeavor to make these equities prevail. Neither owner nor builder is commanded to give a bond, though decisions are not lacking that such a command will be upheld.[3] Cf. *Gant* v. *Oklahoma City*, 289 U. S. 98; *Brazee* v. *Michigan*, 241 U. S. 340. All that the statute does by force of § 3 is to standardize the form, at least in some particulars, when bonds are freely given, and to define the consequences attaching to the standard thus prescribed. The form shall include a clause for the protection of materialmen and laborers:

[3]Rio Grande Lumber Co. *v.* Darke, 50 Utah 114; Roystone Co. *v.* Darling, 171 Cal. 526; American Indemnity Co. *v.* Burrows Hardware Co., (Texas) 191 S. W. 574; cf., however, Gibbs *v.* Tally, 133 Cal. 373; Hess *v.* Denman Lumber Co., (Texas) 218 S. W. 162, 164.

the consequences shall include the exemption of the owner from the burden of a lien, and a like exemption of the builder. *U. S. F. & G. Co.* v. *Parsons, supra.* The security of the bond becomes a substitute for the security of the building contract and of the moneys due thereunder. No arbitrary restraint of liberty of contract is laid upon the owner. His personal liability toward materialmen and laborers is not greater by a dollar than it was at the beginning. To the contrary, it is less. By force of the new security he is relieved of the burden of a lien, yet he has priority of interest in the proceeds of any suit upon the bond. See § 3 quoted *ante.* No arbitrary restraint of liberty is laid upon the builder. Upon the giving of a bond he is charged with a liability in favor of materialmen and laborers, a liability consistent with fair dealing between men in that relation, but he is relieved of the duty of holding present and future payments as a fund impressed with a trust and devoted to specific uses. *U. S. F. & G. Co.* v. *Parsons, supra.* Indeed, this very builder took advantage of that privilege, making an assignment of the contract and its proceeds to a bank; and because of the bond the assignment was upheld. *Hartford Accident & Indemnity Co.* v. *Natchez Investment Co.*, 155 Miss. 31, 53. Plainly he is in no position to complain that the statute is invalid in its application to himself. Indeed, owner and builder do not declare themselves aggrieved, but through silence and inaction, if not otherwise, evince submission and consent. The only other person whose interests are affected is the surety on the bond. If the statute is valid in its application to owner and builder, to obligee and principal, there can be no privilege of the surety to contract on better terms. The secondary obligation must follow the primary one, and conform to its restraints. The surety has the alternative either to write its indemnities and guaranties upon the only terms permitted to obligee and principal, or to renounce the writing altogether. The business of insurance is one peculiarly subject to supervision and control. *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389; *National Insurance Co.* v. *Wanberg*, 260 U. S. 71; *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co., supra.* The Fourteenth Amendment does not make it necessary that materialmen and laborers shall be deprived of fair protection to the end that sureties for profit may be given an opportunity to diversify their bonds.

Liberty of contract is not an absolute concept. *Hardware Dealers Mutual Fire Insurance Co.* v. *Gildden Co., supra; Advance-Rumely Thresher Co.* v. *Jackson, supra; Atlantic Coast Line R. Co.* v. *Riverside Mills,* 219 U. S. 186, 202; *Chicago, Burlington, and Quincy Ry. Co.* v. *McGuire,* 219 U. S. 549, 567; *Mutual Loan Co.* v. *Martell,* 222 U. S. 225, 235; *Highland* v. *Russell Car & Snow Plow Co.,* 279 U. S. 253, 261. It is relative to many conditions of time and place and circumstance. The constitution has not ordained that the forms of business shall be cast in imperishable moulds. There is no question here of the impairment of the obligation of a contract by later legislation. The act assailed by the appellants was in existence for many years before the bond in suit was written. Principal and surety in writing it became subject to the statutes then in force, and by these they must abide.

The judgment of the Supreme Court of Mississippi is accordingly

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.